

San Francisco Law Library

436 CITY HALL

No. 148020


EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

32 571



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

1037-9648

United States
Court of Appeals
For the Ninth Circuit

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

Brief for Petitioners

On Petitioner to Review Decisions
of the Tax Court of the United States

FILED
SEP 2 1950

PAUL P. O'BRIEN, -
WAREHAM C. SEAMAN CLERK

CONTENTS

	<i>Page</i>
Argument	9
Conclusion	21
Facts Involved	3
Points on Which the Petitioners Rely.....	8
Statement of the Case.....	1
Statutes Involved.....	5

CITATIONS

- I. Statutes
- II. Miscellaneous Authorities
- III. Cases

CITATIONS

Page

STATUTES:

Internal Revenue Code: Pt. 1, 53 U. S.	
Stat. at L.; Title 26, United States Code	
Sec. 23(1).....	5, 11, 14, 15, 16, 19
117(a).....	5, 6, 12
117(j).....	2, 4, 5, 7, 12, 16, 19, 21
Sec. 1141-1143	2

MISCELLANEOUS:

Regulations III, Internal Revenue Code	
(Part 29, Title 26, Code of Federal	
Regulations)	
Sec. 29.23(1)-2	15
Bulletin "F" (Revised January 1942)	
Bureau Internal Revenue.....	15, 16
Merten's Law of Federal Income Taxation	
Sec. 22.11(a).....	9

CASES:

Albright v. United States, 173 F. 2d	
339 (CCA8, 1949).....	10, 11
N. Stuart Campbell, 5TC 272 (1945)	12, 19
Elgin Building Corp., 8TCM 114 (1949)	11
Isaac Emerson, 12TC 875 (1949).....	11
John D. Fackler, 45BTA 708 (1941)	
(Aff'd. 133 F. 2d 509-CCA6, 1943).....	12
Nelson A. Farry, 13TC8 (1949).....	10
Fawn Lake Ranch, 12TC 1139 (1949)....	11
Leland Hazard, 7TC 372 (1946).....	10, 12, 19
William H. Jamison, 8TC 182	
(1947)	10, 11, 19
George F. Jephson, 37 BTA 1117	
(1938)	19
Munising Motor Co., 1 BTA 286 (1925)	16
Solomon Wright, Jr., 9 TC 173 (1947)	11

Nos. 12535 and 12536

United States
Court of Appeals
For the Ninth Circuit

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

Brief for Petitioners

On Petitioner to Review Decisions
of the Tax Court of the United States

STATEMENT OF THE CASE

These are petitions to review determinations of The Tax Court of the United States (R. 42, 43) that there are deficiencies in the income and victory tax of the petitioners for the year 1943 in the amounts of \$1,655.27 and \$1,687.29

respectively, under the provisions of sections 1141, 1142, and 1143 of the Internal Revenue Code (Pt. 1, 53 U. S. Stat. at L.; Title 26, United States Code), as amended by section 36, Act of June 25, 1948 (62 U. S. Stat. at L. 991; Suppl. II, United States Code, 1946 Ed, p. 684). The opinion of The Tax Court (R. 26) is reported at 8 TCM 1096.

The asserted deficiencies are based upon the respondent's refusal to permit certain gains on the sales of certain dwelling units (houses and lots) constructed for renting and rented by the petitioners under the rules of the office of Production Management and of the National Housing Agency to eligible war workers, to be taxed as capital gains according to section 117(j), Internal Revenue Code.

The respondent based his treatment of the gains in question as ordinary income rather than capital gain (taxable at a lower rate and not subject to the victory tax) on his finding that the properties in question were held for sales to customers in the ordinary course of the petitioners' business (R. 19); and the finding was confirmed by The Tax Court in its findings of fact (R. 32). The validity of that finding on the basis of the stipulation of facts (R. 74-76) is the issue in these petitions for review.

FACTS INVOLVED

The essential facts on this issue were stipulated (R. 74-76), and additional evidence thereon was presented at the hearing before Judge Samuel B. Hill (R. 44-73). In summary these facts are as follows:

The petitioners are husband and wife all of whose income was community property income (Par. 2, Stipulation of Facts, R. 74), and their taxable income was returned in moieties on their separate returns (R. 54). The petitioner husband had started in the millwork and lumber business at Stockton, California, in 1930 (R. 46) after considerable prior experience in that line of work. In 1940 he branched out into the building contracting business and developed a city subdivision (R. 46), and in 1942 he started building houses for rent in two projects involving 63 family units (Exhibits 1 and 2; R. 49-50), which were rented to qualified war workers through the petitioners' rental agents, the firm of Sims & Grupe (R. 51). In connection with his contracting business Mr. Rubino had built probably six or seven (R. 47, 57) dwellings for sale before starting on the rent housing projects in 1942. From 1935 or 1936 on the petitioners were in the business of farming near Linden, California, (R. 45, 46, 67, Exhibits A and B); and subsequent to 1943 they were also engaged in the restaurant business and in the wholesale

building material and hardware business (R. 53).

Thirty-three rented dwelling units were sold by the petitioners during the taxable year 1943, within the terms of the wartime regulations under which they were built and operated as rent properties. The gains on the sales of 23 such units, which had been held for less than six months were returned as ordinary income subject to the victory tax in the petitioner's returns. The other ten units sold had been held for more than six months from the dates of completion of the dwellings. Because of such term of holding the gains on the sales of these units were returned as if they were gains on the sales of capital assets according to the provisions of section 117(j), Internal Revenue Code (copied *infra*), with a result of lower income taxes on the petitioners' returns and the exclusion of the gains from the amount subject to the victory tax temporarily in effect for that year (Stipulation of facts, par. 5, R. 75; Exhibit B). The right of the petitioners so to classify the gains was denied by the respondent. The Tax Court's affirmance of such denial is the sole issue in this petition for review.

In the petitioners' 1943 returns there was deducted from their gross income from rents and allowed by the respondent depreciation in the sum of \$2,141.15 on thirty of the above-

mentioned rent dwellings which had been rented during that year and which were being rented at the end of the year. No depreciation was, however, deducted for the ten dwellings which were part of the units sold during 1943, the gains from which sales are the subject of controversy herein, but depreciation of these ten dwellings was admitted by the respondent to be allowable at the same rate for 1942 and 1943 as allowed for the 30 dwellings in use at the end of 1943 in the stipulation of facts filed in The Tax Court (Par. 4 of stipulation, R. 75) which stipulation was adopted in the findings of fact in the report of The Tax Court (R. 28, 30).

STATUTES INVOLVED

The parts of the income tax law (sections 23(1), 117(a), and 117(j), Internal Revenue Code (Title 26, United States Code) which are chiefly involved in this proceeding are copied hereunder for the convenience of the Court.

SEC. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions—

(1) *Depreciation.* A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —

(1) of property used in the trade or business, or

(2) of property held for the production of income.

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *DEFINITIONS—*

As used in this chapter —

(1) **CAPITAL ASSETS** — The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * *

(4) **LONG-TERM CAPITAL GAIN** — The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

(j) GAINS AND LOSSES FROM INVOLUNTARY CONVERSION AND FROM THE SALE OR EXCHANGE OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS —

(1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS —

For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) GENERAL RULE — If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or immi-

nence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

POINTS ON WHICH THE PETITIONERS RELY

I. The addition of section 117(j) to the income tax law by the Revenue Act of 1942 was a relief measure to be construed liberally in favor of taxpayers.

II. The opinion below was inconsistent with The Tax Court's prior interpretation of section 117(j), Internal Revenue Code.

III. The Tax Court's finding of ultimate fact that ten rented dwelling units "were held by petitioner primarily for sale to customers in the ordinary course of his business" was contrary to the stipulation of facts and inconsistent with the facts in the record.

ARGUMENT

I. The addition of section 117(j) to the income tax law by the Revenue Act of 1942 was a relief measure to be construed liberally in favor of the taxpayers.

A lucid explanation of the legislative history and intent of section 117(j) as added to the income tax law by section 151 of the Revenue Act of 1942 (c. 619, 56 U. S. Stat. at L.) is found in the 1949 Supplement, Vol. 3, to Mertens' Law of Federal Income Taxation, Sec. 22.11(a), pp. 257 et seq. The Congressional Committee Reports cited in that explanation indicated very plainly that the intent of the sub-section was to furnish relief in the taxation of gains from certain types of transactions (including the sale of depreciable property and land used in a trade or business) without denying taxpayers the full benefit of the provisions of the prior law in the case of losses and in addition, to extend the benefit of any limited deductions to losses on the disposition by sale, exchange, or involuntary conversion of real estate used in the trade or business.

The United States Court of Appeals for the Eighth Circuit has recognized the special character of this part of the income tax law as a relief provision in *Albright v. United States*, 173 F. 2d 339 (1949), 37 A. F. T. R. 1125, a case involving farmer's sales at a gain of dairy and breeding livestock subject to an allowance for depreciation, where it said:

“Section 117(j) was intended as a relief measure applicable alike to all taxpayers within its provisions. *Leland Hazard*, 7 T. C. 372. That it was so intended is clearly expressed in the report of the Committees of the House of Representatives and of the Senate in charge of the bill”.

The Tax Court had given that section the same special character in its opinion in the *Hazard* case, *supra*, 1946, and in *William H. Jamison*, 8 T. C. 182 (1947), which cases, incidentally, both involve the sales by taxpayers of property used in the business of renting stores or dwellings.

II. The opinion below was inconsistent with The Tax Court's prior interpretation of section 117(j), Internal Revenue Code.

From its first case arising under the provisions of section 117(j), Internal Revenue Code, as added by the Revenue Act of 1942, *Leland Hazard*, 7 T. C. 372 (1946), down to *Nelson A. Farry*, 13 T. C. 8 (1949), The Tax Court had followed closely and impartially an interpretation of the terms of section

117(j) to include all sales of property which the owners had held for rent and which was, from that fact, subject to the allowance for depreciation granted by section 23(1) of the income tax law, regardless of the immediate circumstances of its sale. The provisions of section 117(j) are by no means limited to involuntary conversion transactions nor even to sales induced by force of economic circumstances such as pressure of creditors, adverse operating results, and the like. As is evident from the application given them by the Court of Appeals for the Eighth Circuit in the *Albright* case, *supra*, to sales of dairy and breeding animals by a farmer, they include normal and recurring transactions of a continuing business. And the Tax Court has been quick to follow that opinion. Cf. *Fawn Lake Ranch Co.*, 12 T. C. 1139 (1949), and *Isaac Emerson*, 12 T. C. 875 (1949). In so doing it is merely being consistent with its line of rent property cases, which includes, in addition to the *Hazard* and *Farry* cases, *supra*, the following:

William H. Jamison, 8 T. C. 173 (1947);

Solomon Wright, Jr., 9 T. C. 173 (1947);

Elgin Building Corp., 8 T. C. M. 114 (1949);

as well as a number of other memorandum opinions.

In all of its cases involving rent properties,

and, more recently, the cases involving live-stock subject to the allowance for depreciation, the status of the property with respect to the depreciation allowance has been the touchstone of the classification of the sale as being within or without the definition of property covered by the provisions of section 117(j) as it had been previously with regard to the changed definition of capital assets in section 117(a) (1) of the Revenue Act of 1938 by which property used in business subject to the allowance for depreciation was excluded from that definition. If the property was, or had been, subject to the allowance for depreciation, it was *ipso facto* excluded from the application of the capital gain and loss provisions of the law. A basic opinion following the 1938 change is *John D. Fackler*, 45 B. T. A. 708 (1941), affirmed (C. C. A. 6 1943), 133 F. 2d 509, 30 A. F. T. R. 932, which case and an extreme one, so far as its facts are concerned, *N. Stuart Campbell*, 5 T. C. 272 (1945), were the precedents for the leading case under the 1942 amendment adding section 117(j) to the law, *Leland Hazard*, *supra*.

It is significant for the petitioners' purposes that Judge Hill's opinion below (R. 34 *et seq.*) omits any mention of any of these cases by way of distinguishing them or avoiding their implications in the situation presented by the stipulated facts, citing instead a group

of cases which either arose for taxable years prior to 1939 or in which the facts are not comparable to those in this case.

III. The Tax Court's finding of ultimate fact that ten rented dwelling units "were held by petitioner primarily for sale to customers in the ordinary course of his business" was contrary to the stipulation of facts and inconsistent with the facts in the record.

The stipulation of the parties regarding the subject matter of this petition for review is found in paragraphs 4 and 5 of the stipulation of facts (R. 75), which The Tax Court found to be true (R. 28), and its report (R. 30, 31) copies or paraphrases the facts thus stipulated in the course of the Court's statement of the facts found on "Issue 1".

In the "Opinion" part of the report of the division of The Tax Court (R. 34-39) Judge Hill has explained his finding of ultimate fact complained of in this proceeding for review of that Court's decision as being made on the failure of the facts proven by the petitioners to overcome the presumption of the correctness of respondent's determination quoted in his findings of fact (R. 32) in the words as follows: "Since these transactions were frequent and continuous, it is considered that these houses are properly held for sale in the ordinary course of your business".

It is the petitioners' primary contention here that when the respondent stipulated as he did, in a concession right down to the exact amounts claimed in assignments of error 4(a) and 4(c) of the petitions (R. 5 and 6), that the depreciation claimed as "sustained, suffered and allowable on certain rent houses constructed * * * and rented and used in the business of renting dwellings" was allowable in the amounts claimed, he had precluded any further contention on his part that the units in question were not held and used in the petitioners' business of renting dwellings. The only section of the income tax law under which an allowance for depreciation may be made is section 23(1), I. R. C., which by its terms requires that the depreciation allowable must be either "(1) of property used in the trade or business, or (2) of property held for the production of income." If, as the respondent contended in his briefs in the proceeding below and as Judge Hill found, the dwelling units in question had been "held by petitioner primarily for sale to customers in the ordinary course of his business", then the depreciation has been made directly contrary to the provisions of section 23(1). In his use of the word "primarily" in his finding Judge Hill indicates the possibility that he considers that the allowance of depreciation on houses the subject of sales may be squared with the

terms of section 23(1) by their being “secondarily” or in some degree less than “primarily” used in the business of renting dwellings, thus solving the apparent conflict between his finding and the allowance of depreciation. Such ambiguity of primary and secondary uses is apparently repugnant to the respondent’s own regulations on the allowance of depreciation.

Reference to the respondent’s regulations respecting depreciable property, Sec. 29.23 (1)-2, Regulations 111 (Part 29, Title 26, Code of Federal Regulations), makes this repugnance abundantly clear. That section reads in part as follows:

The necessity for a depreciation allowance arises from the fact that certain property *used in the business*, or treated under section 29.23 (a)-15 as held by the taxpayer for the production of income, gradually approaches a point where its usefulness is exhausted. The allowance *should be confined to property of this nature.* * * *

It does not apply to inventories or to stock in trade, or to land apart from the improvements or physical development added to it. * *

* The deduction of an allowance for depreciation is limited to property *used in the taxpayer’s trade or business*, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income. * * *

In the respondent’s Bulletin F (1942) it is stated (p. 89) that

A dealer in automobiles may not deduct

depreciation on either new or used automobiles which constitute part of his stock in trade, since such items are required to be inventoried under the provisions of section 22(c) of the Internal Revenue Code.

The last quoted statement appears to have been based on a venerable opinion of The Tax Court in *Munising Motor Co.*, 1 B. T. A. 286 (1925).

Judge Hill has pointedly avoided in his opinion any reference to the well established integration of the allowance of depreciation with the classification of property as excepted from the definition of capital assets in section 117(a) (1), Internal Revenue Code, and as included in assets subject to the provisions of section 117(j) as defined in section (117(j) (1), *idem*. See in this connection our discussion of this integration in the argument on Proposition II above. The suspected reason for such avoidance is that it would have interfered with his finding excuses rather than reasons for the determination of ultimate fact against the petitioners which he had arrived at on what appears to be an unreasoned basis derived possibly from his impression of the petitioner husband formed during the latter's testimony at the hearing or from some personal attitude toward the policy underlying the relief provisions of section 117(j).

The lameness of Judge Hill's excuses is il-

illustrated in his emphasis of the statement of Mr Rubino's accountant, Mr. Konig, attached as a rider to his 1942 return (Exhibit A), copied in the opinion (R. 35), as "proving" the taxpayers' intent to build and hold the houses in question "primarily for sale". To explain the bearing of such a gratuitous statement on the accountant's part on his conclusions he had to make two assumptions (R. 37) totally a variance with the petitioner's testimony regarding his returns (1) "that a person of petitioner's apparent business acumen would express his intention with respect to the homes in question to the accountant who made out his returns" and (2) that "certainly there must have been some discussion between him and his accountant concerning the status of these homes". The pertinent testimony of Mr. Rubino at the hearing with regard to the contents of his returns was

"As far as these (his returns) are concerned I know very little of these here. I have my accountant to explain all of these here. All I do is sign one of them, they pick them up, prepare them for me, then send them in to you. You have our records, and that is all Greek to me." (R. 71), and

"Through the tax situation I would say that my rentals would come out to the best advantage. That is, I am not saying that—like I say, my accountant takes care of all that. I am not too familiar with any of these statements. That is, I have them take care of them for me." (R. 65)

It is obvious that Mr. Rubino was not in practice or in temperament a man who bothered with the details of his financial statements or tax returns or discussed them with his accountants.

It would appear from Judge Hill's emphasis, on this matter from Mr. Rubino's 1942 return, that he had in mind some sort of a subjective test of the question as to whether the petitioners were in the business of renting dwellings, by which a statement of the accountant who prepared the return in explanation of the method of accounting for the costs of finished dwellings which was technically subscribed to by the petitioner husband when he signed his return, would negative the objective facts shown by the income tax returns, and by the stipulation of facts that the petitioners had rented during the years 1942 and 1943 no less than 64 dwellings. A diligent search of the cases disclosed nowhere the approval of a subjective test in a question of this kind.

In evaluating the petitioner's testimony at the hearing as "proof" of Mr. Rubino's not being in the business of renting dwellings Judge Hill picks out a general statement (R. 36) by the witness of his business activities at the very beginning of his testimony but overlooks and disregards the positive testimony as to the details of his renting business on direct examination (R. 51-53) and on cross-

examination (R. 58-61, R. 64-65). As shown in Mr. Rubino's testimony summarized in our statement of facts above, he was engaged simultaneously in several businesses including the renting of dwellings. And it is well established in the cases pertaining to the application of the definitions in sections 117(a)(1) and 117(j)(1) that a taxpayer may be considered as being in two or more businesses at the same time.

George S. Jephson, 37 B. T. A. 1117 (1938) ;
N. Stuart Campbell et al, 5 T. C. 272 (1945) ;
Leland Hazard, 7 T. C. 732 (1946) ; and
William H. Jamison, 8 T. C. 173 (1947).

Another circumstance cited by as "proof" of the petitioners' intention to hold the rented properties "primarily for sale" is the practice of renting without leases on a month to month basis. Here again there is a resort to an assumption that the reason for this was that Mr. Rubino "wished to keep his property easily available for sale". It is suggested that he might with equal reason have assumed that the practice was due to the fact that the terms of renting were so governed by the conditions of his application for priorities and the regulations of the National Housing Agency as to make leases superfluous or to the disinclination of the war workers to whom he was obliged to rent the houses to make leases because of

the temporary nature of their war work employment in Stockton. None of the assumptions either made or not made by Judge Hill in any way weakens the effect of the fact that in every case the dwellings sold were rented at the time of their sale either to the tenant or to others.

As illustrating the possibility of personal prejudice of Judge Hill against the petitioner husband attention is called to his putting an answer which that petitioner had not made into his mouth in the colloquy on pages 51 and 52 of the Record where he stated that Mr. Rubino had said "Not to my knowledge" in response to the question "You still have houses to rent?"; and to his sharp reproof to Mr. Rubino (R. 69).

All we want is a frank statement of what your business is. We don't want too much of this "don't know" stuff. Apparently you are a pretty good businessman.

It is submitted on a reading of the petitioner husband's whole testimony that his inability to testify to the details of his business and transactions was no different or more pronounced in his answers on cross-examination than they had been on his direct examination. Throughout the testimony there was evidenced a habit and disposition on Mr. Rubino's part to leave the details of transactions to his book-keeper, his accountants, and his rental agents.

His own counsel had just about as much difficulty in getting concise and detailed responses from him as did the Court and the respondent's counsel.

In conclusion it is submitted that there is nothing in Judge Hill's opinion in explanation of his finding of ultimate fact on the main issue in this case which explains away the effect of the respondent's stipulation that the houses in question were subject to a deduction for depreciation because they were used in the petitioners' business of renting dwellings to preclude any finding or conclusion that such dwellings were held "for sale to customers in the ordinary course of (their) business".

CONCLUSION

In view of our showing above (1) that the provisions of section 117(j) were intended as a relief provision to be construed liberally in favor of the taxpayer, (2) that the decision of The Tax Court against the petitioners was inconsistent with a consistent line of cases of that Court on sales of rent properties, and (3) that Judge Hill's finding of ultimate fact complained of was precluded and inhibited by the respondent's stipulation of a depreciation al-

lowance on the very houses the sale of which is the subject of controversy, it is prayed that this Court of Appeals reverse the decision of The Tax Court on this issue.

Respectfully,

WAREHAM C. SEAMAN

Attorney for the Petitioners

Nos. 12535-12536

**In the United States Court of Appeals
for the Ninth Circuit**

LOUIS RUBINO, PETITIONER

v.

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
and**

CATHERINE RUBINO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

**ELLIS N. SLACK,
L. W. POST,**

*Special Assistants to the
Attorney General.*

FILED

OCT - 6 1950

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	6

Argument:

The Tax Court correctly sustained the Commissioner's determination that the profits here involved are taxable as ordinary income	7
Conclusion	15
Appendix	16

CITATIONS

Cases:

<i>Albright v. United States</i> , 173 F. 2d 399.....	12
<i>Beck v. Commissioner</i> , 179 F. 2d 688.....	8
<i>Black v. Commissioner</i> , 45 B.T.A. 204.....	13, 14
<i>Carter, A. L., Co. v. Commissioner</i> , 143 F. 2d 296.....	13
<i>Commissioner v. Boeing</i> , 106 F. 2d 305, certiorari denied, 308 U. S. 619	8
<i>Ehrman v. Commissioner</i> , 120 F. 2d 607, certiorari denied, 314 U. S. 668	10
<i>Fackler v. Commissioner</i> , 133 F. 2d 509.....	13
<i>Gillotte's Estate v. Commissioner</i> , 182 F. 2d 1010.....	9
<i>Greene v. Commissioner</i> , 141 F. 2d 645, certiorari denied, 323 U. S. 717.....	8
<i>Harvey v. Commissioner</i> , 171 F. 2d 952.....	10
<i>Hazard v. Commissioner</i> , 7 T. C. 372.....	8, 12
<i>Jamison v. Commissioner</i> , 8 T. C. 173.....	12
<i>Marks & Co. v. Commissioner</i> , 12 T. C. 1196.....	10
<i>Richards v. Commissioner</i> , 81 F. 2d 369.....	8
<i>Snell v. Commissioner</i> , 97 F. 2d 891.....	10
<i>United States v. Gypsum Co.</i> , 333 U. S. 364.....	9
<i>Welch v. Helvering</i> , 290 U. S. 111.....	8
<i>White v. Commissioner</i> , 172 F. 2d 629.....	9

Statute:

Internal Revenue Code:

Sec. 117 (26 U.S.C. 1946 ed., Sec. 117).....	7, 16
Sec. 1141 (26 U.S.C. 1946 ed., Sec. 1141).....	2, 9

Miscellaneous:

Bulletin F, Bureau of Internal Revenue (Revised January, 1942), p. 85	14
Treasury Regulations 111, Sec. 29.117-7.....	17

**In the United States Court of Appeals
for the Ninth Circuit**

Nos. 12535-12536

LOUIS RUBINO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

and

CATHERINE RUBINO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 26-41) are unreported.

JURISDICTION

These appeals involve income and victory taxes for 1943. (R. 27.) The Commissioner's notice of deficiency (R. 15-23)¹ was mailed to the taxpayer on or about

¹At the request of counsel for the taxpayers, only the record of Louis Rubino has been printed (R. 94) so that unless otherwise indicated, record references herein will be to his case and he will be called the "taxpayer."

October 8, 1947. (R. 15.) Within 90 days thereafter, and on December 9, 1947, the taxpayer filed his petition with the Tax Court for redetermination under Section 272 of the Internal Revenue Code. (R. 4-23.) The decisions of the Tax Court that there is a deficiency in income and victory tax for the year 1943 in the amount of \$1,655.27 in the case of Louis Rubino and in the amount of \$1,687.29 in the case of Catherine Rubino were entered on January 19, 1950. (R. 3, 42, 43.) The case is brought to this Court by petition for review filed March 27, 1950 (R. 3, 83-89), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court properly sustained the Commissioner's determination that the property involved was held by taxpayer primarily for sale to customers in the ordinary course of business so that the profits from the sale of such property are taxable as ordinary income and not as capital gains under Section 117(j) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

These cases were consolidated for trial and report in the Tax Court. (R. 2, 27.)

The Tax Court found the following facts with respect to the issue as to which these appeals have been taken (R. 28-32):

The taxpayers are husband and wife residing at Stockton, California. They filed separate tax returns for the years involved on the community property basis with the Collector of Internal Revenue for the First

District of California. Taxpayers' returns for 1942 were filed on April 15, 1943, under an extension of time granted by the Commissioner. During all of the years material to this proceeding the taxpayers kept their books and filed their returns on the accrual basis. Taxpayer, Louis Rubino, will hereafter be referred to as taxpayer. (R. 28.)

During the years involved taxpayer owned and operated the Alpine Mill & Lumber Company and was also engaged in the business of ranching and building homes for sale. (R. 28.)

In order to obtain materials needed for the building of houses, taxpayer filed with the Office of Production Management in February, 1942, one application for priorities for materials to be used in the construction of 49 dwelling houses and another application for priorities for materials to be used in the construction of 13 dwelling houses. Both applications were approved on April 7, 1942. In the applications taxpayer stated that the proposed total monthly rental to be charged per dwelling unit was \$50 (R. 28-29.)

During the war years the National Housing Agency issued certain general orders, one of which included "III. National Housing Agency General Orders, Part 702, Title 24, Code of Federal Regulations." (R. 29.) Section 5 of that order provided as follows (R. 29-30):

Section 5. Disposition of Private War Housing

.01 Private war housing begun on or after February 10, 1943, shall be held for rental only to eligible war workers for the duration of the national emergency declared by the President on September 8, 1939, and, except for involuntary transfers, shall be disposed of only as follows:

a. An occupant, after two months' occupancy, may purchase the private war housing unit oc-

cupied by him subject to NHA General Order No. 60-3.

b. A person who will not himself occupy such housing may purchase or otherwise acquire such housing at any time, in accordance with NHA General Order No. 60-3, provided the occupancy and disposition limitations applicable to such housing prior to such purchase or acquisition shall continue to be applicable to such housing after such purchase or acquisition, or

c. At any time subsequent to 60 days after completion of any such housing, the owner of such housing may petition the National Housing Agency, in accordance with NHA General Order No. 60-3, to permit such housing to be disposed of otherwise than as provided above in this subsection 5.01.

The fair average useful life of the dwellings rented by taxpayer in 1943 was 30 years. The taxpayers in their 1943 income tax returns deducted depreciation amounting to \$2,141.15 in total on 30 of such dwellings which had been rented during 1943 and which were being rented at the end of that year. The deduction was not changed or adjusted by the Commissioner on audit of the returns. The taxpayers did not deduct in their income tax returns for 1942 and 1943 any amount for the depreciation of 10 dwellings which were sold during 1943 and which had been rented on an oral lease month-to-month basis. All of taxpayer's houses which he rented were rented on that basis. In addition, due to the shortage of housing, most of the homes which taxpayer rented were rented prior to completion. The depreciation allowable on the 10 dwellings amounts in total to \$110.83 for the year 1942 and to \$735.75 for the year 1943. (R. 30.)

During the taxable year 1943 taxpayer sold 33 dwellings. On their 1943 returns the taxpayers showed the

reported gains on 23 of such dwellings as short-term capital gains and on 10 of the dwellings as long-term capital gains. Of these 10 houses, three were constructed or completed in 1942, three in February, 1943, and four in March, 1943. The gross sales price of the 10 dwellings and the lots on which they were located was \$53,465 and the realized gain by the taxpayers, after adjusting for the allowable depreciation of \$110.83 and \$735.75 for the taxable years 1942 and 1943, respectively, as set forth in the above paragraph, was \$17,-164.11. (R. 30-31.)

In 1944 taxpayer sold 27 houses, one of which had been constructed in 1941, one in 1942, 15 in 1943, and 10 in 1944. During 1945 he sold four homes that were constructed in 1943. (R. 31.)

The sales and rentals of the houses owned by taxpayer in 1943 were handled by real estate brokers. Taxpayer previously had constructed and held homes for sale in 1940 and 1941. (R. 31.)

For the year 1943 taxpayer's receipts from the rental of real estate were \$15,108.28, and after deduction of depreciation of \$2,141.15 his rental income was \$12,-967.13 before deductions for interest on mortgages, taxes, maintenance, overhead, real estate agents' commissions, etc. His profit on real estate sold during the same year was \$35,458.25 after deduction of both direct and indirect costs. (R. 31.)

In the "Explanation of Adjustments" concerning the property which taxpayer sold in 1943 the receipts from which taxpayer has treated as taxable as capital gains, the Commissioner stated as follows (R. 31-32):

During the taxable year 1943 you sold thirty-three houses of which three were constructed by you during the last six months of 1942 and the remaining thirty during 1943. Since these transactions were frequent and continuous, it is con-

sidered that these houses are properly held for sale to customers in the ordinary course of your business. Accordingly, the profit realized on such sales is taxable as ordinary income.

The dwelling units involved, together with the lots, were held by taxpayer primarily for sale to customers in the ordinary course of his business. (R. 32.)

The Tax Court upheld the Commissioner's determination. (R. 34-39.)

SUMMARY OF ARGUMENT

The Tax Court properly sustained the Commissioner's determination that the homes in question were held by the taxpayer primarily for sale to customers in the ordinary course of his business and therefore the profits from sales of such homes should be treated as ordinary income and not as capital gains under Section 117(j) of the Internal Revenue Code. The Tax Court found as an ultimate fact that the property was held primarily for sale to customers in the ordinary course of business. That finding is clearly correct and there is ample evidence to sustain it. The sales were not casual but frequent and continuous, the profits realized were substantial, and in his 1942 income tax return taxpayer stated he was building homes for sale. Taxpayer's effort to prove he was engaged primarily in renting the property is not convincing. The fact that depreciation was allowable on the rented buildings is beside the point, and it is not at all inconsistent with the conclusion that the property was held primarily for sale to customers in the ordinary course of business. In the circumstances there is no adequate basis for disturbing the decision of the Tax Court here, and it should therefore be affirmed.

ARGUMENT

The Tax Court Correctly Sustained the Commissioner's Determination That the Profits Here Involved Are Taxable as Ordinary Income

The fundamental question presented on these appeals is whether the gains from the sales here involved are taxable as ordinary income, as determined by the Commissioner and held by the Tax Court; or whether such gains should be treated as capital gains under Section 117(j) of the Internal Revenue Code (Appendix, *infra*), as claimed by the taxpayers.

Section 117(a) of the Internal Revenue Code² excludes, among other things, from the definition of "capital assets" property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, depreciable property used in the trade or business, and real property used in the trade or business of the taxpayer.

In 1942 Section 117(j) (Appendix, *infra*) was added to the Code. This provides for special treatment where gains exceed losses from the sale or exchange of certain property used in the trade or business. Such gains are treated as capital gains. This is a relief provision for the benefit of such taxpayers as come within it.

² SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) [as amended by Sec. 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Capital Assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), * * * or real property used in the trade or business of the taxpayer;

See *Hazard v. Commissioner*, 7 T. C. 372, 376 (Acquiescence, 1946-2 Cum. Bull. 3). However, Section 117(j) expressly excludes property held by the taxpayer primarily for the sale to customers in the ordinary course of his trade or business, and the gains from the sale of property so held are taxable as ordinary income.

It follows that if the Tax Court correctly held in the instant case that the property here involved was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business then the profits in question cannot be treated as capital gains under either Section 117(a) or (j), and must therefore be treated as ordinary income. We submit that the Tax Court's decision is correct.

The Commissioner made the following determination in the instant case (R. 19, 31-32):

During the taxable year 1943 you sold thirty-three houses of which three were constructed by you during the last six months of 1942 and the remaining thirty during 1943. Since these transactions were frequent and continuous, it is considered that these houses are properly held for sale to customers in the ordinary course of your business. Accordingly, the profit realized on such sales is taxable as ordinary income.

The Commissioner's determination is presumptively correct and the taxpayer has the burden of proving it to be wrong. *Commissioner v. Boeing*, 106 F. 2d 305, 311 (C.A. 9th), certiorari denied, 308 U. S. 619; *Beck v. Commissioner*, 179 F. 2d 688 (C.A. 7th); *Welch v. Helvering*, 290 U. S. 111, 115. The question whether the property was held primarily for sale to customers in the ordinary course of business is a question of ultimate fact (*Richards v. Commissioner*, 81 F. 2d 369, 370 (C.A. 9th); *Greene v. Commissioner*, 141 F. 2d

645, 646 (C.A. 5th), certiorari denied, 323 U. S. 717), and the finding of the Tax Court with regard thereto should not be overturned unless clearly erroneous. See Section 1141(a) of the Internal Revenue Code, as amended by Section 36, Act of June 25, 1948, c. 646, 62 Stat. 869; *United States v. Gypsum Co.*, 333 U. S. 364, 394-395; *Gillette's Estate v. Commissioner*, 182 F. 2d 1010 (C.A. 9th); *Beck v. Commissioner*, *supra*.

With the foregoing principles in mind, we submit that the Tax Court properly sustained the Commissioner's determination in the instant case. The taxpayer not only failed to prove it wrong, but the record clearly shows that it is right.

In its opinion the Tax Court pointed out (R. 35) that taxpayer in his income tax return for 1942³ gave his occupation as "Owner, Alpine Planing Mill; Contractor and Builder," and in the same return he stated as follows:

During 1942 *taxpayer engaged in building homes for sale and on contract*. In addition taxpayer had under construction 53 homes as of December 31, 1942. These homes remained unsold as of close of year. Materials, millwork and sub-contracts capitalized at cost, without taking into consideration usual mark up. Profits on houses built for sale are reported when sold, and it has not been customary to capitalize any anticipated mark up due to increasing values. (*Italics supplied.*)

The foregoing statements are admissions and they are certainly relevant (cf. *White v. Commissioner*, 172 F. 2d 629 (C.A. 5th)); and while as stated by the Tax Court (R. 35-36) the fact that homes were built for sale would not necessarily be controlling if it could

³ This return was admitted in evidence as the Commissioner's Exhibit A (R. 54-55) and although not printed it has been transmitted to this Court and by order of this Court filed August 8, 1950, may be referred to in briefs or argument.

be shown that they were converted to rental properties and held primarily for that purpose at the time of sale (cf. *Marks & Co. v. Commissioner*, 12 T. C. 1196, Acquiescence, 1949-2 Cum. Bull. 3), still, as also pointed out by the Tax Court (R. 36) the record affirmatively shows that not only were the homes in question built by taxpayer for sale, but he continued to hold them for that purpose.

In this connection the Tax Court pointed out (R. 36) :

In the year involved he sold 33 of the 62 houses constructed during 1942 and 1943. He sold 27 additional homes in 1944 and 4 more in 1945. His profits from sales of homes during 1943 far exceeded his net income from rentals.

And of course the number of houses sold and the profits realized are cogent evidence that the property was held primarily for sale to customers in the ordinary course of business. See *White v. Commissioner*, *supra*. The transactions in the instant case were not casual but frequent and continuous, and the activities of taxpayer were such as to fully support the conclusion that he was in the business of selling the houses. *Commissioner v. Boeing*, *supra*, 106 F. 2d 305, 309; *Ehrman v. Commissioner*, 120 F. 2d 607 (C.A. 9th), certiorari denied, 314 U. S. 668. It is not necessary for this to have been his sole business or to have occupied all his time. *Harvey v. Commissioner*, 171 F. 2d 952 (C.A. 9th); *Snell v. Commissioner*, 97 F. 2d 891 (C.A. 5th).⁴

⁴ The court there said (97 F. 2d at pp. 892-893):

This taxpayer must, to defeat his claim to a capital gains rate, have been in the business of selling his lands. An occasional sale of land held as an investment is not such a business though profits result. The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation. It need not be one's sole occupation, nor take all his time. It may be only seasonal, and not active

The Tax Court recognized (R. 36-37) that most of the homes in question were rented prior to completion but it also noted that they were rented on oral leases on a month-to-month basis. And in this connection the Tax Court aptly said (R. 36-37):

Another factor in support of our conclusion is the method used by petitioner in renting the homes in question. As we have pointed out in our findings, most of the homes which petitioner constructed were rented prior to completion. This was due to the shortage of dwellings in this area at the time. It would seem under these conditions that if petitioner had been in the business of renting homes he would have leased them for reasonably long periods of time. Petitioner, however, rented those dwellings on oral leases on a month-to-month basis. Certainly this fact is strong evidence that he wished to keep his property easily available for sale, or, in other words, that he was holding it primarily to sell.

The Tax Court was not unmindful of the regulations of the National Housing Agency which taxpayer relied upon in support of his contention that the property was held primarily for rental. In this connection the Tax Court pointed out (R. 38-39) that assuming that these regulations affected the dwellings in question, the fact remains that during 1943 taxpayer sold 33 homes, or over half of the homes which he built under priorities granted by the National Housing Agency, and that his income from sales of these homes far exceeded his return from rentals. And the Tax Court further observed that the regulations in question expressly provided for sales of housing under certain terms and conditions. It is apparent that these regula-

the year round. It ordinarily is implied that one's own attention and effort are involved, but the maxim *qui facit per alium facit per se* applies, and one may carry on a business through agents whom he supervises.

tions are not inconsistent with the conclusion reached by the Tax Court that taxpayer held the property in question primarily for sale to customers in the ordinary course of business, and indeed we note that in the taxpayer's brief filed in this Court it is stated (p. 4) that the dwelling units here involved were sold within the terms of the war-time regulations. And in any event it is submitted for the reasons given above and in the opinion of the Tax Court, that regardless of the provisions of the regulations the evidence justifies the Tax Court's finding that the property in question was in actuality held primarily for sale.

The taxpayer says (Br. 9-10) that Section 117(j) is a relief measure to be construed liberally in favor of taxpayers. It is true that Section 117(j) is a relief provision for the benefit of taxpayers, but it is also true that they have the burden of bringing themselves within its scope (see *Albright v. United States*, 173 F. 2d 339, 342 (C.A. 8th)) and there is no basis for any deviation from the established principles, outlined above, that the question whether property was held primarily for sale to customers in the ordinary course of business is one of ultimate fact and the Tax Court's finding in regard thereto should be accepted on appeal unless clearly erroneous. There is nothing to the contrary in the cases cited by taxpayer. Br. 10; *Albright v. United States*, *supra*; *Hazard v. Commissioner*, *supra*, *Jamison v. Commissioner*, 8 T. C. 173 (Acquiescence, 1947-1 Cum. Bull. 2).

Taxpayer relies heavily (Br. 10, 11) on *Albright v. United States*, *supra*. In that case the taxpayer, a farmer, sold certain livestock culled from his dairy and breeding herds, and the court held, one judge dissenting, that in the circumstances such livestock were not held by the taxpayer primarily for sale to customers in the ordinary course of his business and

therefore the profits should be treated as capital gains and not as ordinary income under Section 117(j). It seems plain that whatever may be thought as to the correctness of the decision in the *Albright* case, still it is distinguishable from the instant one where the evidence fully justifies the Tax Court's conclusion that the homes in question, although rented on a month-to-month basis, were held primarily for sale to customers in the ordinary course of his business.

Taxpayer says (Br. 10-16) that the right to depreciation is of critical importance in determining the applicability of Section 117(j) and that since depreciation was allowable on the homes in the instant case it necessarily follows that they were held primarily for rent and not for sale. We submit that this contention is unsound. It seems plain that the allowance of depreciation deductions under Section 23(1) is entirely consistent with the conclusion that the property was held primarily for sale. Moreover, we see nothing in Section 29.23(1)2 of Treasury Regulations 111, or any of the other authorities cited by taxpayer (Br. 10-16) which is at variance with that view. True, depreciation is only allowed in respect of property used in the trade or business, or in respect of property held for the production of income. But a taxpayer may have more than one business (*Fackler v. Commissioner*, 133 F. 2d 509 (C.A. 6th); *Harvey v. Commissioner*, *supra*) and where as here the property was rented, depreciation was allowable even though the renting was essentially temporary and the property was held primarily for sale to customers in the ordinary course of business. Depreciation is generally allowed in respect of rented buildings and this is so without regard to whether they are held primarily for sale. *A. L. Carter Co. v. Commissioner*, 143 F. 2d 296 (C.A. 5th); *Black v.*

Commissioner, 45 B.T.A. 204; Bulletin F, Bureau of Internal Revenue (Revised January, 1942), p. 85.

Taxpayer attempts (Br. 17-18) to minimize the significance of the statement in his 1942 tax return (Exhibit A referred to above) to the effect that the homes in question were built for sale, but we submit that such endeavor is unconvincing. Even if the return was prepared by an accountant still the accountant must have drawn on taxpayer for the required information to prepare it and in the circumstances we submit that the Tax Court was justified in concluding that (R. 37)—

a person of petitioner's apparent business acumen would express his intention with respect to the homes in question to the accountant who made out his returns. At least he did not attempt to explain that statement in the return at the hearing. Certainly there must have been some discussion between him and his accountant concerning the status of these homes.

It can not lightly be presumed that the accountant would make unauthorized statements in taxpayer's return.

Taxpayer criticizes the Tax Court's handling of this case rather severely (R. 18-21), but we submit that there is no adequate basis for such criticism.

In the light of these considerations we submit that the decision of the Tax Court is in all respects correct; taxpayer's objections and criticisms are without merit and there is no reversible error.

CONCLUSION

The decisions of the Tax Court should be affirmed.

Respectfully submitted.

THERON L. CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

L. W. POST,

Special Assistants to the Attorney General.

SEPTEMBER, 1950.

APPENDIX

Internal Revenue Code:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(j) [as added by Sec. 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127 of the Revenue Act of 1943, c. 63, 58 Stat. 21.] *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of Property Used in the Trade or Business.*—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable.

(2) *General Rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses

from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

* * * * *

(26 U.S.C. 1946 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.117-7 [as amended by T. D. 5394, 1944 Cum. Bull. 274, 276.] *Gains and Losses from Involuntary Conversions and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—Section 117(j) provides that the recognized gains and losses

(a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

(1) of a character subject to the allowance for depreciation provided in section 23(1), or

(2) real property,

provided that such property is not of a kind which would properly be includible in the in-

ventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, and

* * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets.

* * * *

Nos. 12535-12536

United States
Court of Appeals
for the Ninth Circuit.

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

Reply Brief of Petitioners

On Petitions To Review Decisions of The Tax Court
of the United States

FILED

OCT 16 1950

PAUL P. O'BRIEN,
CLERK

INDEX

	<i>Page</i>
Argument	2
Conclusion	14
Preliminary Statement	2

CITATIONS

CASES:

Albright v. United States, 173 F2d 399.....	10, 11
A. Benetti Novelty Co., 13 T. C. 1072.....	11
Charles H. Black, Sr., 45 B.T.A. 204.....	13
A. L. Carter Co. v. Commissioner, 143 F2d 296.....	12
Fackler v. Commissioner, 133 F2d 509.....	8, 12
Nelson A. Farry, 13 T. C. 8.....	11
Harvey v. Commissioner, 171 F2d 952.....	12
Manhattan General Equipment Co. v. Commissioner 297 U.S. 129 (1936).....	8
Robert H. Montgomery, 37 B.T.A. 232.....	14

CITATIONS

Page

STATUTE:

Internal Revenue Code:

Sec. 23 (l)	2, 12, 13
Sec. 23 (o)	9
Sec. 117 (a)	2, 7, 10
Sec. 117 (j)	2, 3, 4, 7, 8, 9, 10, 11

MISCELLANEOUS:

Bulletin F, Bureau of Internal Revenue (Revised January, 1942) Page 85	13
Merten's, Law of Federal Income Taxation, Sec. 22.110, Page 258	7
Ways and Means Committee Report No. 2333, Seventy-Seventh Congress, First Session, 1942-2 C.B. 414-5	5
Senate Finance Committee Report No. 1631, Seventy-Seventh Congress, First Session, 1942-2 C.B. 525, 594	5, 6

REGULATIONS:

Treasury Regulations 103, sec. 19.117-1	3
Treasury Regulations 103, sec. 19.117-7	3, 4, 8
Treasury Regulations 111, sec. 29.117-7	3, 4, 7, 8
Treasury Decision No. 5217, 1943 C.B. 314, 327	3
Treasury Decision No. 5394, 1944 C.B. 274	3, 7

Nos. 12535-12536

United States
Court of Appeals
for the Ninth Circuit.

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

Reply Brief of Petitioners

On Petitions To Review Decisions of The Tax Court
of the United States

PRELIMINARY STATEMENT

The petitioners filed their brief in these petitions for review on September 6, 1950, and the brief of the respondent was received by the petitioners' attorney on October 6, 1950. This reply brief is therefore due to be filed on or before October 16, 1950.

ARGUMENT

The argument for the respondent correctly states (Br. 7) "that the fundamental question presented on these appeals is whether the gains from the sales here involved are taxable as ordinary income, * * * or whether such gains should be taxed as capital gains under section 117(j) of the Internal Revenue Code", but it pointedly avoids getting down to cases and principles pertaining to the construction and application of that section.

The petitioners have argued for a recognition of a primary dichotomy in the definition of the coverage of section 117 (j) by section 117 (j) (1) between "property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months", and all of the other classes of income, three in number, which are excluded from the definition of "capital assets" in section 117 (a) (1).

The respondent in his arguments assumes, without any explanation of his assumption, that no such

dichotomy exists and that property sold may be at one and the same time both property used in the trade or business and property held primarily for sale to customers in the course of the taxpayer's business. It is important to note here that he has not always so held with respect to the definition in section 117 (j) (1).

The dichotomy in that definition was clearly recognized in the respondent's first interpretation of section 117 (j) in his addition to Regulations 103 (Title 26, Federal Code of Regulations, Part 19) of Sec. 19.117-7 by Par. 11, T. D. 5217, C. B. 1943, pp. 314, 327, approved January 19, 1943, and in the amendment of Sec. 19.117-1 of those Regulations by Par. 5(A) of that Treasury Decision. The corresponding sections of Regulations 111 (Title 26, Federal Code of Regulations, Part 29) were in substantially the same words as used in T. D. 5217 when those Regulations were approved October 26, 1943, and published two days later. It was not until the issuing of T. D. 5394, C. B. 1944, p. 274, approved July 27, 1944, after these petitioners had filed their 1943 returns, that the respondent interpreted section 117 (j) (1), I. R. C., to deny the dichotomy which he had previously recognized by including in the first sentence of Sec. 29.117-7 the clause:

“provided that such property is not of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business”.

Compare the copy of the amended provisions in the appendix of the respondent's brief, p. 17.

If we assume that this amendment of Sec. 29.117-7 (Sec. 19.117-7, Regulation 103, has never been similarly amended), which was a retroactive interpretation of section 117 (j) (1), I. R. C., was made on consideration of the clause in the definition in that section of the code reading: "which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", it is submitted that the construction of that clause as a *proviso* affecting the first and principal part of the definition preceding it, with a strong implication that there might have been intended by the Congress some possibility of property being at the same time depreciable property or real estate used in the taxpayer's business and property in one of the two classes designated under (A) and (B) of the quoted clause, is not supported by the language used in the statute nor by its legislative history. As to the language itself, the words are not those of a *proviso*, which, had the Congress so intended them, were abundantly familiar to draftsmen of revenue laws, which are replete with them, and easy to state in positive form.

As to the legislative history of the section in question, the Revenue Bill of 1942 as passed by the House of Representatives had in it independent amend-

ments of the capital gains provisions relating (1) to the sale of improved real estate and (2) to gains and losses from involuntary conversions and on sales or exchanges of depreciable property used in trade or business, which amendments are explained in items 21 and 25 of the Ways and Means Committee's summary of technical and administrative amendments to the income tax chapter of the Code in its Report, No. 2333, Seventy-seventh Congress, First Session. These items appear in the Bureau of Internal Revenue reprint of the report at pp. 414 and 415, C. B. 1942-2. Consideration of these amendments by the Senate Finance Committee resulted in their coalescence into the group of amendments of section 117 found in section 151 of the Revenue Act of 1942. The general explanation of these amendments in that Committee's report, No. 1631, Seventy-seventh Congress, Second Session, found in the Bureau reprint at p. 525, C. B. 1942-2, is as follows:

“(2) Under the House bill losses from the sale of real property and buildings were treated as capital losses, even though the property was used in the trade or business. Your committee has changed this rule by taking buildings and real estate used in the trade or business of the taxpayer out of the definition of capital assets, and applying to them the same rule which the House bill applies to gains and losses from involuntary conversions from the sale or exchange of certain depreciable property. If the total gains exceed the losses, such gains will be considered as gains from the sale or exchange of capital assets held for more than six months.

If the gains do not exceed the losses, such losses will be treated as ordinary gains and ordinary losses instead of capital gains and capital losses. It is believed that this Senate amendment will be of material benefit to businesses which, due to depressed conditions, have been compelled to dispose of their plant and equipment at a loss.

The bill defines property used in a trade or business as property used in the trade or business of a character which is subject to the allowance for depreciation and real property held for more than six months *which is not properly includible in the inventory of the taxpayer if on hand at the close of the taxable year or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.*

If a newspaper purchased the plant of a rival newspaper and later sold such plant and equipment at a loss, such plant and equipment, being subject to depreciation, would constitute property used in a trade or business within the meaning of this section." (Italics supplied.)

Attention is directed to the italicized part of this explanation using the words of the clause, the construction of which we are here considering, not having been separated or distinguished from the part of the definition preceding it by so much as a comma to set it off as other than a simple modifier of what went before. Neither in this explanation nor in the detailed discussion of the technical provisions of section 153 of the Bill (which became section 151 of the Act), on p. 594, C. B. 1942-2, is

there anything showing any intent other than one to make clear, in an abundance of caution, that the provisions of sub-section (j) were to apply only to the two classes of property already excluded from the definition of capital assets, section 117 (a) (1), as described in the principal part of the definition in section 117 (j) (1), and not to the two other classes of property which had been likewise excluded from the definition of capital assets.

In the discussion in the 1950 Supplement to Mertens, Law of Federal Income Taxation, Sec. 22.110, p. 258, of the amendments in the Revenue Act of 1942 by which section 117 (j) was added to the income tax law, the clause quoted above is construed as merely modifying the phrase "real estate used in the trade or business". That construction is more certainly in accord with the rules of English syntax and sound principles of statutory construction than the *proviso* construction in Sec. 29. 117-7 as amended by T. D. 5394, *supra*.

Although T. D. 5394 is stated in its opening sentence to have been issued "in order to conform Regulations 111 * * * to sections 101 and 127 of the Revenue Act of 1943, enacted February 23, 1944", sections 101 and 127 of that Act made no change whatever in the clause of section 117 (j) (1) here under consideration. There must therefore have been some other motive for the insertion by that Treasury Decision of the *proviso* interpretation of the subject clause. The timing of this change, more than 18 months after the first interpretative regulation by T. D. 5217,

C. B. 1943, p. 314, adding Sec. 19.117-7 to Regulations 103, and the confirmation of that interpretation in the original Sec. 29. 117-7 of Regulations 111 only eight months before the change was made, strongly indicates that it may have been motivated more by consideration of the effect of the respondent's victory in the case of *Fackler v. Commissioner of Internal Revenue*, 133 F.2d 509 (C. C. A. 6, Feb. 4, 1943) on cases such as the instant one arising after the amendments to section 117 in the Revenue Act of 1942 to make the rule of that case generally more beneficial to taxpayers than to the Government than it was by any doubts of the prior non-argumentative construction having been made according to pertinent and valid rules of statutory construction.

It is too well established to admit of argument that the respondent cannot validly make an arbitrary or unreasonable regulation, or one that repeals or enlarges the scope of a statute. The respondent appears to have tried to enlarge the scope of the definition of section 117 (j) (1) by his amendment of Sec. 29.117-7, Regulations 111. As was stated by the Supreme Court in *Manhattan General Equipment Co v. Commissioner of Internal Revenue*, 297 U. S. 129 (1936), 80 L. Ed. 528, 56 S. Ct. 397:

“The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation

which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.” (Italics supplied.)

Since the amendment in question enlarged the scope of the definition in section 117(j) (1) “out of harmony with the statute,” it “is a mere nullity.”

Both the opinion of Judge Hill in the report of The Tax Court and the respondent’s argument in his brief have emphasized the presumption of correctness of the respondent’s determination of tax liability and the burden on the petitioners to overcome that presumption. It is submitted that the presumption of correctness relates primarily to facts and not to the respondent’s interpretation of the law except in those instances where the statute particularly provides for administrative details to be handled according to “regulations prescribed by the Commissioner with the approval of the Secretary,” as in section 23 (o), I. R. C. When it is shown, as we have shown above, that the respondent has based his determination on an improper construction of the statute and that The Tax Court has adopted the same construction, the facts of record have finally to be judged according to the law as correctly construed.

As has been shown in the petitioners’ opening brief, pp. 17 to 20, the finding as ultimate fact that the dwellings in question in this proceeding were held primarily for sale to customers could be justified in The Tax Court’s opinion only on the bases of assumptions and hypotheses which provided a frail founda-

tion for his findings, even if the correctness of that Court's and the respondent's construction of the law were conceded. However, under a proper and valid construction of the statute, the stipulation of facts furnished full proof of the error of the respondent's determination and the Tax Court's finding is wholly erroneous because it is quite immaterial to the real criteria of classification for the purposes of section 117 (j).

Although the Court of Appeals for the Eighth Circuit in its opinion in *Albright v. United States*, 173 F. 2d 339, did not adopt a dichotomic construction of the definition in section 117 (j) (1), I. R. C., as contended by the petitioners in the instant case, it did arrive at a result consistent with such construction by finding as a fact that dairy and breeding herd sales of cows and hogs were not "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" despite the evidence and common knowledge that such sales were normal and regular events in businesses such as Mr. Albright's. In so doing it was in effect following the lines of cases in the Tax Court under section 117 (j) and the amendment of the definition of capital assets in section 117 (a) (1) of the Revenue Act of 1938 cited under Proposition 11 of the petitioners' opening brief (pp. 10-13) which made the depreciable character of the property sold the touchstone of the classification of a sale as being within or without the definition of property subject to special treatment by one definition or the other.

In this connection it is of some significance to note that Judge Hill in a case decided by him contemporaneously with this one, *A. Benetti Novelty Co.*, 13 T. C. 1072, promulgated December 22, 1949, had no difficulty in deciding, exactly in line with the dichotomic interpretation of the definition in section 117 (j) (1) if not specifically on such a basis that the sales by the Novelty Company of slot machines and juke boxes to agencies of the Army and Navy were within the coverage of section 117 (j) despite the stipulated fact that it "was requested (the exact time was not disclosed) by various agencies of the Army and Navy to acquire for them as many of these machines as possible" and that it "complied with these requests, sending its agents through Nevada and the adjoining states and buying any and all machines offered for sale". The inconsistency of his opinion in that case, which he supported with quotations from *Nelson A. Farry*, 13 T. C. 8, a case comparable in its facts to the instant one, and from the *Albright* case, *supra*, with his opinion in this case (R. 26-41) is all too apparent on comparison of the two opinions. The only reasonable explanation of such inconsistency is that the author of the two opinions valued the patriotic effort of the Novelty Company in supplying the military components of the war effort with amusement and gambling devices more highly than he did the patriotic effort of Mr. Rubino in supplying the civilian components of that effort with housing. In view of this inconsistency, it is submitted that the petitioners' criticisms of Judge Hill's opinion on

the basis of prejudgment and prejudice (pp. 16 to 21 of their opening brief) are amply justified despite the respondent's question begging submission (p. 14 of his brief) "that there is no adequate basis of such criticism".

The respondent's argument (p. 13 of his brief) that there is no inconsistency between the allowance of depreciation on property and its classification as being held *primarily* for sales to customers in the ordinary course of a taxpayer's business is patently fallacious. It simply begs the question when it says (p. 13) that "we see nothing in Sec. 29. 23(1) -2 of Treasury Regulations 111, or any of the other authorities cited by the taxpayer which is at variance with that view". In the *Fackler* case, *supra*, cited by him it was precisely the integration of the depreciation provisions of section 23 (1) with the definition of capital assets in section 117 (a) (1) which enabled the respondent to win the decision over Mr. Fackler. The case of *Harvey v. Commissioner of Internal Revenue*, 171 F. 2d 952 (C. A. 9, 1949). also cited by the respondent, turned in the respondent's favor on the same point, p. 954, in support of which this Court cited the *Fackler* opinion. The case of *A. L. Carter Co. et al. v. Commissioner of Internal Revenue*, 143 F. 2d 296 (C. A. 5, 1944) simply decided that allowable depreciation, whether previously deducted by the taxpayer or not, had to be deducted from the cost of rented dwellings sold by the taxpayer in 1938 and 1939. There was no question raised as to the classification of the gains as capital assets since under

the definition of such assets as amended by the Revenue Act of 1938 depreciable assets were excluded from the definition. It is not apparent why the case of *Charles H. Black, Sr.*, 45 B. T. A. 204 (1941) is cited by the respondent in this connection inasmuch as the case makes no reference whatever to the depreciable character of the building there involved. It would seem that if the respondent's attorney in that case had brought up the relationship of depreciation allowances to business use as furnishing a basis for classification of the property in question as a capital asset used in the taxpayer's business, he might have won it instead of losing it.

The reference to Bulletin "F", Income Tax Depreciation and Obsolescence (Revised January 1942), p. 85 (Br. p. 14) is not precise as to the matter to which the respondent wishes the Court's attention directed. If he refers to the paragraph headed "*Rented Property*", the statement therein, that depreciation of real property rented for residential property is deductible even though the operation of such property is not the taxpayer's principal trade or business, does not appear to be significant of any point involved in this proceeding. If, however, he refers the paragraph headed "Buildings not occupied", it is suggested that the rule there stated is obsolete in relation to the precise conditions for the allowance of depreciation set forth in Sec. 29.23 (1)-2, Regulations 111 quoted on p. 15 of the petitioners' opening brief, and appears in the Bulletin as revised in 1942 by reason of careless editing of matter copied from the 1931 edition of

Bulletin "F", where the same paragraph is printed on page 18. It apparently had its origin in I. T. 1342, C. B. I-1 (1922), p. 169, in which it is stated that depreciation is allowable on buildings held for sale by a taxpayer in the business of constructing and repairing buildings for sale which are not otherwise put to business use. That ruling, seemingly buried and forgotten in the 28 years since it was issued, must be put down as a product of the salad days of the Income Tax Unit when offhand rulings without much legal cogitation (now mostly overruled) were fairly common. I. T. 1342 was overruled in effect by the opinion in the case of *Robert H. Montgomery*, 37 B. T. A. 232 (1938).

CONCLUSION

In view of the demonstration in the foregoing argument of the inadequacy of the respondent's brief to show that the petitioners' contentions in this proceeding are valid objections to the findings of The Tax Court complained of in the petitions for review, it follows that the petitioners should be granted the relief prayed for in their petitions.

Respectfully,

WAREHAM C. SEAMAN,
Attorney for Petitioners.

Nos. 12535-12536

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

AND

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

WAREHAM C. SEAMAN

Attorney for Petitioner.

TOPICAL INDEX

	PAGE
Introductory statement	1
Grounds for rehearing	3

I.

This Court erred in failing to hold as a matter of law that for Federal Income Tax purposes appellants were entitled to report the gain from the sale of rental property subject to depreciation under Sec. 23(l), Internal Revenue Code, at the time of sale and held for longer than six months as Capital Gain under Sec. 117(j), Internal Revenue Code	3
--	---

II.

This Court erred in affirming the finding of The Tax Court of the United States that on the facts, appellants held rental property primarily for sale to customers in the ordinary course of their trade or business.....	4
Conclusion	5
Appendix	7

TABLE OF AUTHORITIES CITED

PAGE

CASES

Delsing v. United States, CA-(5), (1/5/51).....	2, 4, 6
(Citation not available—Set out in full in Appendix)	

Nos. 12535-12536

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

AND

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

*To the United States Court of Appeals for the Ninth
Circuit and the Chief Judge and Associate Judges
Thereof:*

The appellants respectfully petition for a rehearing after the decision by this Court on January 2, 1951, affirming the judgment of The Tax Court of the United States and respectfully present:

INTRODUCTORY STATEMENT.

The decisions of this Court and The Tax Court have raised an important question of statutory construction of the Internal Revenue Code, and it is respectfully

submitted that the decisions have failed to rule on this question of law and that this failure creates a void in a very important section of the Internal Revenue Code extremely vital in the proper determination of tax liability. The absence of this judicial guidance will make for uncertainty in the application of this particular section and will result in the ultimate determination of tax liability solely upon the caprice of the agents of the Respondent except by resort to litigation. That this uncertainty should be resolved is demonstrated by the intervening decision of *Clement W. Delsing and wife, Mildred Delsing*, Appellants vs. *United States of America*, Appellee, in the United States Court of Appeals for the Fifth Circuit decided on January 5, 1951, which case can not be distinguished from that of appellants' in the facts involved. The citation is not available, but the decision is set out in full in the Appendix.

GROUNDS FOR REHEARING.

I.

This Court erred in failing to hold as a matter of law that for Federal Income Tax purposes appellants were entitled to report the gain from the sale of rental property subject to depreciation under Sec. 23(1), Internal Revenue Code, at the time of sale and held for longer than six months as Capital Gain under Sec. 117(j), Internal Revenue Code.

Appellants in their briefs and particularly in their oral argument set forth their strong reliance upon the statutory construction of Sec. 117(j), Internal Revenue Code, to the effect that the relief provisions of that section were intended by Congress to apply to the gain from the sale of any assets held for more than six months which were subject to depreciation under the provisions of Sec. 23(1), Internal Revenue Code. The failure of this Court to distinguish between the application of this section and that of Sec. 117(a), Internal Revenue Code, under the 1938 Revenue Act, which defines Capital Assets, and its departure from all other interpretations of the section except those of the past six months in the Tax Court will have the effect of making almost unavailable the relief intended by Congress in the enactment of Sec. 117(j), Internal Revenue Code.

Furthermore, the hesitancy of this Court to make a finding of law in the construction of Sec. 117(j) (1) will invite extensive litigation because it can reasonably be expected that in the absence of a judicial guidepost the Commissioner will increasingly ignore Sec. 117(j) in the determination of tax liability with the inevitable increasing resort to litigation.

II.

This Court erred in affirming the finding of The Tax Court of the United States that on the facts, appellants held rental property primarily for sale to customers in the ordinary course of their trade or business.

Attention of this court is respectfully drawn to the case of *Clement W. Delsing and wife, Mildred Delsing*, Appellants, vs. *United States of America*, Appellee in the United States Court of Appeals for the Fifth Circuit, *supra*.

Here the facts were surprisingly similar to those of this case and the Court said that the sole question was whether the finding was supported by the evidence or whether it should be set aside as clearly erroneous. In that case, in order to secure priorities, it was necessary to agree to construct the houses for rent. After completion the houses were rented on a month to month basis and the bulk of the homes were sold in one year rather than over a period of years. There was accounting segregation of houses for sale and for rent. The government relied principally upon two facts:

(1) A statement that "these houses are to be built for sale or rent. The houses will be offered for sale assuming permission for this can be obtained from the OPM on the basis", etc.

The Court felt that this statement had been over-emphasized in view of the restriction in the formal application securing priorities.

(2) The taxpayers' income from sales greatly exceeded their income from sales and from rentals.

The court said that "the disparity between in-

come from sales and from rentals is not controlling.” Moreover, in this case, it was indicated that the taxpayer was very active in building houses for sale which were admittedly taxable as ordinary gain.

Your petitioners respectfully cite this case not as indicative of the error of this court in its previous decision but for the purpose of clearly demonstrating the need for judicial direction on this section of the Code.

A taxpayer, as contrasted with the respondent, is at a disadvantage in his selection of forum. Conversely, the advantage in such selection by the respondent can make for unequal application of the tax laws.

CONCLUSION

It is respectfully submitted that this Court should resolve the issue of law by a statutory construction of Sec. 117(j), Internal Revenue Code, in the interest of justice to your petitioners and to set a judicial standard by which tax liability under this section can be determined without the necessity of needless and excessive litigation.

Respectfully submitted,

WAREHAM C. SEAMAN,
Attorney for Petitioner.

I hereby certify that in my judgment the Petition for Rehearing is well founded, and that it is not interposed for delay.

WAREHAM C. SEAMAN,
Attorney for Petitioner.

Appendix

APPENDIX.

*In the United States Court of Appeals
for the Fifth Circuit*

No. 13,243. January 5, 1951

CLEMENT W. DELSING AND WIFE, MILDRED DELSING,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for
the Northern District of Texas.

Reversing and remanding the decision of the United
States District Court.

Before HUTCHESON, Chief Judge, and

HOLMES and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: In this suit to enforce
refund of income taxes, in the District Court the parties
by stipulation submitted as the sole issue, whether the
profit from the sale of Twelve and one-half duplex
dwelling units should be treated as capital gain under
the provisions of Section 117(j) (1) (B) of the Internal
Revenue Code, or ordinary income, with determination
of this in turn restricted to whether such property was

II.

or was not held “primarily for sale to customers in the ordinary course” of the plaintiff taxpayers’ “trade or business.” Upon evidence presented by stipulation, and by the oral testimony of the taxpayer, the trial Court found “the facts to be as stipulated by the parties plus the fact that these properties were originally constructed for sale, or, rental, and, that that course of sale was in the regular course of business when they were sold,” and entered judgment for the government. Thus the sole question here presented is whether the finding is supported by the evidence, or whether it should be set aside as clearly erroneous.

We have concluded that the finding of the Court has no sufficient support in the evidence, is therefore clearly erroneous, and must be set aside.

Without attempting to fully detail the facts, it is sufficient to say that the general factual situation relied upon by the taxpayer is that though he, in partnership with another, had for several years prior to World War II been engaged in a substantial business of construction of homes for sale,—which sales were always consummated prior to or upon completion of the houses,—as the result of solicitation of officials of the Federal Housing Administration in their effort to provide defense rental housing units for war workers in the North Texas area, constructed forty-five defense rental units. In order to construct the housing units it was necessary to secure priorities, and as a result of application for preference ratings, made in March, 1942, the taxpayer and the partnership were required to and did agree to construct the houses for rent at fixed monthly

III.

rental to persons engaged in war activities, and further agreed not to dispose, or contract for disposal, except in accordance with defined regulations which, as amended, required taxpayer to hold the duplex houses here involved for rent at rentals authorized, and further to rent only to eligible war workers. This order provided that the war worker tenant could purchase the duplex after a minimum period of four months, later reduced to two months, on specified terms. After completion the housing units were rented to war workers on a month to month basis, and continued to be rented until August of 1945 when occurred the first of the sales now involved, and the remainder of which were consummated in October and December of 1945.¹ By agency regulation, on and after August, 1943, taxpayer could have sold one-third of the entire defense rental project, but he at no time made any effort to secure approval or to sell any of the units until solicited by returning service men in 1945 to whom he made the sales referred to. To service the rental units the taxpayer maintained a rental office and also devoted a major portion of his time to the operation and management of the properties in performing the activities customary in connection with rental properties. There was a complete segregation of bookkeeping entries and accounting between the income from rental property and the house construction and sales activities of taxpayer. From 1942 to 1945, these latter related only to some 273 defense housing units constructed for sale in 1944 by a different part-

¹ The partnership was dissolved in May, 1944, at which time taxpayer received title to twenty-two and one-half of the duplexes and continued after 1945 to rent the remaining ten.

IV.

nership of which taxpayer was a member. After 1945 the construction exclusively for sale business of taxpayer was likewise segregated. Profit from these sales was reported as ordinary income. No "for sale" or advertisements were placed as to any of the claimed rental property. This was in direct contrast with the sale procedure employed in procuring sales of other property constructed for sale in the period 1945 to 1948. In the latter instance, as was generally true in disposing of houses constructed for sale, the sales were effectuated by a real estate agent. Taxpayer was not a licensed real estate agent.

The only facts relied upon by the government, which could be considered at all material, to controvert and overthrow the taxpayer's position as above summarized, are the statements in a letter written by the taxpayer in January of 1942 to the Federal Housing Administration, apparently as a part of an application for insured loans that "these houses are to be built for sale or rent. The houses will be offered for sale, assuming permission for this can be obtained from the O. P. M., on the basis," etc., together with the fact that during the years in question the taxpayer's income from sales, his usual business, greatly exceeded his income from rentals.

It is apparent from the finding of the trial Court that much weight was given to the statement of intention contained in the letter referred to, and also to the admitted fact that the taxpayer's sales activities constituted his major activity, and from this the Court found that any sale of real estate by him

V.

was in the ordinary course of his business. We think the weight to be given to the statement in the letter has been overemphasized in view of the subsequent restriction embodied in the formal application and agreement under which the houses were actually built, held, and operated by the taxpayer during the period of approximately three years. The disparity between income from sales and from rentals is not controlling. Under the facts and circumstances of this case, we find no permissible basis for a determination that the sales of the originally constructed defense rental housing units constituted a disposition of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," so as to render the profit taxable as ordinary income².

We think the transactions evidenced the sale of capital assets and that accordingly the judgment must be, and is reversed and the cause remanded with direction to enter judgment in favor of the taxpayer for the amount of the refund claimed.

Reversed.

² Compare *Dunlap v. Oldham Lumber Company*, 178 Fed. (2d) 781 [50-1 USTC ¶ 9134].

No. 12537

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

HAROLD WIBYE,
Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

JUL 24 1950

PAUL P. O'BRIEN,

No. 12537

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

HAROLD WIBYE,
Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer No. 27694-G.....	10
Amended Answer No. 27732-H.....	20
Answer to Complaint No. 27694-G.....	7
Answer to Complaint No. 27732-H.....	18
Appeal:	
Certificate of Clerk to Record on.....	42
Designation of Contents of Record on..	43, 212
Notice of	40
Statement of Points to Be Relied Upon on	42, 211
Certificate of Clerk to Record on Appeal.....	42
Complaint No. 27694-G.....	2
Complaint No. 27732-H.....	11
Designation of Contents of Record on Ap- peal	43, 212
Findings of Fact and Conclusions of Law....	31
Judgment	38

	INDEX	PAGE
Minute Orders:		
July 29, 1949 — Further Trial — Ordered Cause Be Submitted on Briefs.....		22
December 14, 1949—Order Matter Be Submitted		23
Names and Addresses of Attorneys.....		1
Notice of Appeal No. 27694-G.....		40
Notice of Appeal No. 27732-H.....		40
Opinion		24
Order Extending Time to Docket No. 27694-G		41
Order Extending Time to Docket No. 27732-H		41
Reporter's Transcript of Proceedings.....		46
Statement of Points to Be Relied Upon on Appeal	42,	211
Trial No. 27694—No. 27732		21
Witness, Defendant's:		
Fipps, Edna D.		
—direct		149
—cross		155
—redirect		160
—recross		161

INDEX

PAGE

Witnesses, Plaintiffs:

Fisher, Lloyd D.

—direct	162, 190
—cross	193
—redirect	200

Schoening, Ernest H.

—direct	117
—cross	129
—redirect	134

Wibye, Harold E.

—direct	48
—cross	73
—redirect	83

Wibye, Nels K.

—direct	85, 104
—cross	112
—redirect	116

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Attorney for Defendant and Appellant.

NICHOLS, RICHARD, ALLARD & WILLIAMS,

EUGENE L. STURGIS,

JOHN D. DEN-DULK,

Attorneys for Plaintiffs and Appellees.

In the District Court of the United States, for the
Northern District of California, Southern Division.

No. 27694-G

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff, complains of the defendant above named and for cause of action alleges as follows:

I.

That this action is prosecuted under and pursuant to the provisions of that certain Act of the Congress of the United States of America generally known and designated as "Public Law 601," Title IV thereof, generally known as "Federal Tort Claims Act."

II.

That at all times herein mentioned John E. Hadley, now deceased, was the agent, servant and employee of said defendant, United States of America, and was at all of the times herein mentioned acting within the course and scope of his employment for said defendant, United States of America, while operating that certain Plymouth automobile herein-after mentioned; that said Plymouth automobile was

at all times herein mentioned owned by said defendant, United States of America.

III.

That at all times herein mentioned State Route No. 513 was a public road and highway, running in a general easterly and westerly direction, in the County of Alameda, State of California, between the Town of Dublin on the east and the City of Hayward on the west; that at all times herein mentioned Dublin Road was another public road and highway, running in a general northerly and southerly direction, in said County of Alameda, State of California, which said Dublin Road did at all times herein mentioned and now does intersect said State Route No. 513 at a point thereon between said Town of Dublin on the east and said City of Hayward on the west.

IV.

That at all times herein mentioned said Town of Dublin and said City of Hayward, in said County of Alameda, State of California, and said State Route No. 513 running between said locations, were and now are in the confines of the Northern District of California, Southern Division, of the District Court of the United States.

V.

That on or about the 8th day of November, 1946, plaintiff herein was riding as a guest in a certain Oldsmobile automobile then and there being driven and operated upon said State Route No. 513 in a general easterly direction at a point thereon ap-

proximately two-tenths of a mile westerly of the intersection of said State Route No. 513 with said Dublin Road; that at said time and place said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, were driving and operating a certain Plymouth automobile in a general westerly direction upon said State Route No. 513 at said location as aforesaid; that at said time and place said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile as to cause it to and it did violently strike and collide with the said Oldsmobile automobile in which said plaintiff was riding, as aforesaid; that as a direct and proximate result of the said carelessness and negligence of said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, as aforesaid, plaintiff herein was thrown violently in and about said Oldsmobile automobile in which he was riding as a guest and did then and there have inflicted upon him the following personal injuries, to wit:

Deep laceration of the right wrist approximately 5 inches in length requiring suturing, and severing 3 extensor tendons, resulting in limitation of motion in said wrist; deep laceration of the left upper arm approximately 4 inches in length requiring sutur-

ing, resulting in partial severance of the triceps tendon; deep laceration of the left forearm approximately 2 inches in length requiring suturing; deep laceration of the left thumb approximately 2½ inches in length requiring suturing; deep laceration in the left armpit approximately 4 inches in length requiring suturing; fracture of the posterior superior lip of the left acetabulum; inter-trochanteric fracture of the right hip; depressed condylar fracture of the lateral condyle of the right tibia, resulting in spraining and tearing of the ligaments, tendons and tissues in the vicinity of the right knee joint, resulting in stiffening of said knee joint; severe cerebral concussion; blow upon the mouth resulting in loosening and damage to all of the upper front teeth which will require extraction of all of said upper teeth; severe nervous shock; cuts, bruises and abrasions to plaintiff's entire body; that by reason of said injuries and each of them plaintiff was made sick, sore, lame and disabled and plaintiff is informed and believes and therefore alleges that said injuries and each of them are permanent in character.

VI.

That as a direct and proximate result of the said carelessness and negligence of said defendant as hereinabove alleged, and solely by reason thereof, plaintiff has been generally damaged in the sum of \$100,000.00.

VII.

That by reason of his injuries and each of them so sustained as aforesaid, plaintiff was compelled to

and did incur the following obligations to the date hereof for the purposes set forth in connection with the care and treatment of the injuries suffered and sustained by him, to wit:

Physicians and surgeons services.....	\$1228.00
Hospital and Laboratory services	1710.41
Nursing hire	900.00
X-ray pictures	235.00

that each of the amounts hereinbefore set forth were and are the reasonable value of said services so rendered to plaintiff to the date hereof in connection with the care and treatment of his said injuries and incidental thereto; that plaintiff is informed and believes and therefore alleges that he will require additional services of physicians and surgeons, hospital and laboratory services, nursing hire, X-ray pictures, and dental services in the future in the care and treatment of his said injuries, the reasonable value of which is at this time unknown to him and the plaintiff prays leave of court that when the reasonable value of said additional services of physicians and surgeons, hospital and laboratory services, nursing hire, X-ray pictures, and dental services to be rendered and procured in the future become known to him, he be permitted to insert the same herein with appropriate charging allegations.

Wherefore, plaintiff prays judgment against the defendant above named in the sum of \$104,073.41, for his costs of suit herein incurred and for such

other and further relief as to the court seems just and proper.

/s/ NICHOLS, RICHARD &
ALLARD,
Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Niels K. Wibye, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief and as to those matters that he believes it to be true.

/s/ NIELS K. WIBYE.

Subscribed and sworn to before me this 6th day of October, 1947.

[Seal] LYNN ALLEN,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed October 11, 1947.

[Title of District Court and Cause.]
No. 27694-G

ANSWER TO COMPLAINT

Comes now defendant, United States of America,

and answering plaintiff's Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations contained in Paragraph VI, and the portion of Paragraph V beginning with the word "that," Line 31, page 2, to and including the word "character," Line 4, page 4, and the portion of Paragraph VII, beginning with the word "that," Line 11, page 4, to and including the figures "235.00," Line 19, page 4; and denies that plaintiff has been damaged in the sum of \$104,073.41 or any part thereof, or in any sum or amount, or at all.

II.

Alleges that it is without sufficient information to form a belief as to the truth of the allegations contained in the portion of Paragraph V commencing with the word "That," Line 21, page 2, to and including the words "Dublin Road," Line 26, page 2, and the allegations contained in the portion of Paragraph VII beginning with the word "that," Line 20, page 4, to and including the word "allegations," Line 2, page 5, and therefore, and basing its denial upon that ground, said defendant denies each and all of said allegations.

III.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto, and alleges that said plaintiff failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, and carelessly and negligently rode and continued to ride in the automobile referred to in said Complaint while the same was being operated by one Harold Wibye in a careless, reckless and negligent manner by said Harold Wibye with the knowledge and consent of the plaintiff herein, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Wherefore, said defendant prays that plaintiff take nothing by his Complaint herein and that said defendant be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney, Attorneys for Defendant,
United States of America.

[Endorsed]: Filed April 15, 1948.

[Title of District Court and Cause.]

No. 27694-G

AMENDED ANSWER

Now comes the defendant and by leave of Court first had and obtained, amends its answer as follows:

I.

Denies that John E. Hadley was at the time of the accident acting within the course or scope of his employment or was at that time an agent, servant or employee of defendant.

II.

Admits that at all times herein mentioned that certain Plymouth automobile mentioned in said complaint was owned by defendant United States of America.

Wherefore, defendant prays that this complaint be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 22, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27732H

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff above named and complains of defendant above named, and for cause of action alleges as follows:

I.

That at all times herein mentioned defendant, United States of America was and now is a Federal sovereign State, organized and existing under and by virtue of the Constitution of the United States and laws made pursuant thereto; that this action is prosecuted under and pursuant to the provisions of that certain Act of Congress of the United States of America and known and designated as "Public Law 601" title IV thereof, generally known as "Federal Tort Claims Act";

II.

That at all times herein mentioned the defendant, United States of America, owned and operated that certain Plymouth automobile, designated by the

Serial No. USA 142857 and further designated by Departmental designation SEGO ADM 12;

III.

That at all times herein mentioned, John E. Hadley, now deceased, was the agent, servant and employee of the said defendant, United States of America, and was at all times herein mentioned, acting within the course and scope of his employment for said defendant, United States of America, while operating the aforesaid Plymouth automobile;

IV.

That at all times herein mentioned, U. S. Highway No. 50, also known as State Route 513, at the point hereinafter designated, was and now is a public Road and Highway in the State of California, running between the Town of Castro Valley on the West, and the Town of Dublin on the East; that said U. S. Highway No. 50, also known as State Route 513 at the point hereinafter designated, runs in a general Easterly and Westerly direction; that another public Road and Highway, within the State of California, known as Dublin Road, at all times herein mentioned did and now does intersect the aforesaid U. S. Highway No. 50 at a point between said Town of Castro Valley and the said Town of Dublin; that that portion of U. S. Highway No. 50, also known as State Route 513, mentioned and described in paragraph V of this complaint, was at all times herein mentioned and now

is within the Northern District of the State of California, Southern Division of the District Court of the United States;

V.

That heretofore, to wit: on or about the 8th day of November, 1946, plaintiff herein was operating a certain Oldsmobile Model 66 Business Coupe automobile, Serial No. 66-70668, motor No. G-394390 in a general Easterly direction on the aforesaid U. S. Highway No. 50, also known as State Route 513, at a point thereon approximately two-tenths of a mile Westerly of the intersection of the said U. S. Highway No. 50 with the said Dublin Road; that at said time and place, said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, were driving and operating the aforesaid Plymouth automobile in a general Westerly direction upon the aforesaid U. S. Highway No. 50 at the point as aforesaid; that at said time and place the said defendant, United States of America, acting by and through its employee, John E. Hadley, now deceased and John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile so that it did violently strike and collide with the aforesaid Oldsmobile automobile being operated by plaintiff; that as a direct and proximate result of the said carelessness and negligence of the said defendant, United States

of America, acting by and through its employee, John E. Hadley, now deceased and John E. Hadley, now deceased, plaintiff was thrown violently in and about the said Oldsmobile automobile being operated by plaintiff, and did then and there have inflicted upon him serious injuries as follows: severe blow on the left part of the head over the left eye, resulting in cerebral concussion, loss of vision in the left eye and severe headaches and nausea; abrasions upon and about the face and teeth; contusion of left chest and shoulder; severe cervical strain with traumatic cervical neuritis on the left side resulting in severe headaches and nausea; six-inch laceration of the anterior of the left patella requiring suturing; four inch laceration across the anterior of the right patella requiring suturing; severe wrench of the neck and upper back with post traumatic parascapular myositis bilaterally; severe persistent pains in the abdomen from the bowels to the chest; cuts, bruises and abrasions to plaintiff's entire body; severe nervous shock; that as a direct and proximate result of the aforesaid injuries, and each of them, plaintiff was made sick, sore and disabled and continues to be sick, sore and disabled, and plaintiff is informed and believes and therefore alleges that the aforesaid injuries are of a permanent nature; that at all times since sustaining said injuries, plaintiff has suffered and still does suffer great pain and anguish and plaintiff is informed and believes and upon such information and belief alleges that he will continue to suffer such physical pain and anguish;

VI.

That as a direct and proximate result of said carelessness and negligence of the said defendant as hereinabove alleged, and solely by reason thereof, plaintiff has been generally damaged in the sum of Seventy Five Thousand (\$75,000.00) Dollars;

VII.

That by reason of the injuries sustained by plaintiff as hereinabove set forth, for treatment of the aforesaid injuries, plaintiff incurred obligations as follows:

Physicians and Surgeons services.....	\$240.00
X-rays	96.30
Hospital and Laboratory services.....	198.91
Convalescent and nursing care.....	475.00
<hr/>	
Total	\$1010.21

that the amount set forth are the reasonable value for services rendered to plaintiff; that plaintiff is still under the care and treatment of physicians and surgeons, and plaintiff is informed and believes and therefore alleges that he will require further services in connection with the care and treatment of his injuries; that the reasonable value of said further services as may be required is not known at this time and plaintiff prays leave of the Court that when the reasonable value of said additional services are ascertained, he be permitted to amend this complaint, setting forth such additional amounts as may be required;

VIII.

That prior to the date of the accident hereinabove alleged, plaintiff was gainfully employed in the occupation of Construction Superintendent, and that for approximately five (5) years immediately preceding the aforesaid accident, to wit: five (5) years immediately preceding November 8th, 1946, plaintiff was earning the sum of approximately One Hundred and Forty (\$140.00) Dollars per week; That since the date of the accident as hereinabove alleged, to wit: November 8th, 1946, plaintiff has been unable to carry on the occupation for which he is fitted, by reason of the injuries sustained by plaintiff as the result of the accident as aforesaid; that he has lost earnings prior to the date of this Complaint, and since the date of the accident, in the sum of Seven Thousand Two Hundred and Eighty (\$7280.00) Dollars, or thereabouts; that plaintiff is still unable to work and is informed and believes and therefore alleges that he will continue to be unable to work; that he will be further damaged in the sum of One Hundred and Forty (\$140.00) Dollars per week for each and every week that he is unable to work by reason of said injuries.

Wherefore, plaintiff prays judgment against defendant above mentioned in the sum of Eighty Three Thousand Two Hundred Ninety and 21/100 (\$83,290.21) Dollars; for his costs of suit and for

such other and further relief as to the Court seems meet and proper.

/s/ EUGENE K. STURGIS,

/s/ JOHN D. DEN-DULK,

Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Harold Wibye, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief and as to those matters, that he believes it to be true.

/s/ HAROLD E. WIBYE.

Subscribed and sworn to before me this 5th day of November, 1947.

[Seal] /s/ JOHN D. DEN-DULK,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed November 6, 1947.

[Title of District Court and Cause.]

No. 27732-H.

ANSWER TO COMPLAINT

Comes now defendant United States of America, and answering plaintiff's Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations of Paragraph VI, the portion of Paragraph V beginning with the word "that," Line 5, page 3, to and including the word "shock," Line 30, page 3, and the portion of paragraph VII, beginning with the word "That," Line 14, page 4, to and including the figures "\$1010.21," Line 22, page 4; and denies that plaintiff has been damaged in the sum of \$83,291.21, or any part thereof, or in any sum or amount or at all.

II.

Alleges that it is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph VIII, the portion of Paragraph V, beginning with the word "that," Line 30, page 3, to and including the word "anguish," Line 7, page 4, and the portion of Paragraph VII beginning with the word "that," Line 23, page 4, to and including the word "required," Lines 32-33, page 4, and, therefore, and basing its denial upon that ground, denies each and all of said allegations.

III.

Further answering said Complaint and as a sep-

arate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence thereto, said defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto; and alleges that said plaintiff failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, failed to use his eyes and other faculties upon said occasion and carelessly and negligently drove and operated his automobile on such occasion so that same was caused to collide with the other automobile referred to in the Complaint, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Therefore, said defendant prays that plaintiff take nothing by his Complaint herein and that it be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney, Attorneys for Defendant,
United States of America.

[Endorsed]: Filed April 15, 1949.

[Title of District Court and Cause.]

No. 27732-H

AMENDED ANSWER

Now comes the defendant and by leave of Court first had and obtained, amends its answer and denies and alleges as follows:

I.

Admits that defendant owned that certain Plymouth automobile designated by serial number USA 142857.

II.

Denies that at the time of the accident John E. Hadley was acting within the course and scope of his employment by the United States of America.

III.

Denies that the United States of America, acting by and through John E. Hadley, was driving and operating the aforesaid Plymouth automobile.

Wherefore defendant prays that the complaint be dismissed and that defendant have its costs incurred herein.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 22, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 28th day of July, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27694 Civil

No. 27732 Civil

TRIAL

These cases, heretofore having been consolidated for purposes of trial, came on regularly this day for trial before the Court sitting without a jury. Paul Richard, Esq., was present on behalf of the plaintiff, and Daniel Deasy, Esq., Assistant U. S. Attorney, was present on behalf of the defendant. Harold E. Wibye, Nils Wibye and Ernest H. Schoening were sworn and testified on behalf of the plaintiff, and Mr. Richard introduced Plaintiff's Exhibits 1 to 11, inclusive, which were admitted in evidence. Edna G. Fipps was sworn and testified on behalf of the defendant. The hour of adjournment having arrived, the Court Ordered the further trial of these cases continued to July 29, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 29th day of July, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27694 Civil

No. 27732 Civil

FURTHER TRIAL—ORDERED CAUSE BE
SUBMITTED ON BRIEFS

The parties hereto being present as heretofore, the further trial of these cases was resumed. Lloyd D. Fisher was sworn and testified on behalf of the plaintiff, and Mr. Richard introduced Plaintiff's Exhibits 12 to 22, inclusive, which were admitted in evidence. Both sides thereupon rested. After hearing from the attorneys herein, it is Ordered that this cause be submitted on briefs to be filed in 15, 15 and 5 days. Further Ordered that these cases be continued to September 12, 1949, for submission.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27732 Civil

No. 27694 Civil

ORDER MATTER BE SUBMITTED

The two above-entitled cases came on regularly this day for further hearing. After hearing Paul Richard, Esq., for plaintiff, and R. Scholz, Esq., Assistant U. S. Attorney, for the United States, it is Ordered that this matter be submitted.

In the United States District Court for the Northern
District of California, Southern Division

Consolidated Cases No. 27732 and No. 27694-G

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

RICHARD NICHOLS,

ALLARD & WILLIAMS,

Attorneys for Plaintiffs.

FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

OPINION

Goodman, District Judge.

In these two consolidated actions for damages for personal injuries brought under the Federal Tort Claims Act, (60 Stat. 843; 28 USC 931, et seq.), the liability of the United States depends

upon whether John E. Hadley, a civilian employee of the Stock Control Division of the United States Quartermaster Corp., was acting "within the scope of his office or employment," at the time the government automobile he was driving struck that of the plaintiffs.

The Facts

The evidence at the trial was substantially as follows:

Hadley's duties required him to travel up and down the west coast of the United States, visiting various Quartermaster Depots and performing certain work there. His traveling was done in a government automobile. His work schedule for November, 1946, was introduced in evidence, from which it appeared that it was his duty to proceed from Seattle, Washington, to the Stockton Quartermaster Depot, located at Lathrop, near Stockton, in the San Joaquin Valley, California. The schedule also called for certain days to be spent by him at Lathrop. It also provided for a travel period, upon completion of his assignment at Lathrop, en route back to Fort Lewis, Washington, near Seattle, at which place he was scheduled to arrive on November 11th.

On the night of Thursday, November 7, Hadley telephoned from Lathrop to his mother, Mrs. Edna Fipps, who lived in San Francisco, and informed her that he would leave Lathrop on Friday and drive to San Francisco for the purpose of having dinner with her Friday evening, on his way back to Fort

Lewis, and also for the purpose, incidentally, of cashing some checks. On Friday afternoon, while en route from Lathrop to San Francisco over highway No. 50, at a point near Dublin, in the County of Alameda, Hadley's car careened over onto the wrong side of the road and crashed into the automobile in which the plaintiffs were riding at the time. Hadley was instantly killed and plaintiffs each suffered severe and permanent injuries. That plaintiffs' injuries were caused by negligence of Hadley is undisputed.

The distance from Lathrop, California, to Fort Lewis, Washington, is approximately 900 miles. At the time of the accident, Hadley had only proceeded a short distance on the long trip ahead of him. The coast route through San Francisco, which he elected to take, is approximately 60 miles further than the inland route from Lathrop through Sacramento, California, to Seattle.

Discussion

Under California law, proof of car ownership gives rise to the inference that an employee of the owner, in possession of the owner's car, is on the business of the owner. Plaintiffs contend that this inference amounts to prima facie proof that Hadley was acting within the scope of his employment by the United States at the time of the accident.¹ We

¹In *Murphy v. U. S.*, 79 Fed. Supp. 925, Judge Lemmon of this Court held the California inference to be pertinent in an action under the Tort Claims

may pass this question inasmuch as other admissible evidence establishes liability.

Hadley's mother was called as a government witness and her hearsay testimony as to the telephone conversation with her son was elicited during her examination. Both plaintiffs and the government have advantaged themselves of the testimony, hearsay though it was, each interpreting it favorably to their or its cause and neither side raised any question as to its admissibility. Because of the importance of this testimony in determining whether Hadley's trip to San Francisco was the first leg of his journey back to Seattle or a distinctly personal side trip, we have conducted independent research and are satisfied that the telephone conversation is admissible. This is so because it falls within a well-recognized exception to the hearsay rule, namely, the so-called "state of mind exception." The rationale of this exception is that a person's own statement of a presently existing state of mind, made in a natural and unsuspecting manner, is

Act. The U. S. Court of Appeals of the Fifth Circuit in *Hubsch v. U. S.*, 174 F. 2d 7, held a comparable inference under Florida law to be insufficient proof of liability of the United States under the Act, but the Supreme Court granted certiorari in the case on Oct. 10, 1949, . . . U. S. . . . , and on Dec. 19, 1949, before argument, remanded the cause to the District Court for the purpose of approving or disapproving a compromise settlement pursuant to §2677 of Title 28 USC. Thus the question posed has not been determined by the Supreme Court.

proper evidence with respect to a design or intent to perform a specific act. It is clear that Hadley's statement to his mother was a completely unrehearsed and spontaneous announcement of his plan, intent and purpose of returning to Fort Lewis, Washington, via San Francisco. His mother's testimony as to such statement was therefore admissible. *Mutual Life Insurance Company v. Hillmon*, 145 U. S. 285. See, also, note 113 A.L.R. 268; 3 Wigmore on Evidence, 2nd Ed. Section 1725, page 696.

The prime legal issue which the Court is required to resolve is whether, in proceeding from Lathrop to Fort Lewis, Washington, there was such a deviation from the route of return to Fort Lewis as would take Hadley outside the scope of his employment and put him on his own business rather than that of the government. As to this, it is sufficient to say that no specific travel route was prescribed by the government for Hadley to follow. It is evident from the nature of the itinerary that the choice of routes was his own. It was only required that after finishing his labors at Lathrop, Hadley was to report to Fort Lewis, Washington, not later than a date fixed. After leaving Lathrop, Hadley was pursuing a route which would take him to Fort Lewis without the necessity of retracing any of the distance covered or of even returning to the so-called inland route, via Sacramento, to Fort Lewis. Therefore, the fair and just conclusion is that, after leaving Lathrop, Hadley was simultaneously upon the government's business and satisfying his own

desire to visit his mother in San Francisco on the way.

Decisions of the California Courts, which, our research reveals, are not untypical of the law generally, clearly indicate that where a deviation from the main travel route is slight and merely involves a choice of routes, it is not sufficient to take an employee out of the scope of his employment. The rule appears to be that "where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." *Ryan v. Farrell*, 208 Cal. 200 (1929). See also, *Westberg v. Willde*, 14 Cal. 2d 360 (1939); *Cain v. Marquez*, 31 Cal. App. 2d 430 (1939); *Kruse v. White Brothers*, 81 Cal. App. 86 (1927); *Dennis v. Miller Automobile Company*, 73 Cal. App. 293 (1925); *Montgomery v. Hutchins*, 118 F. 2d 661 (9th Cir. 1941). I hold that Hadley was within the scope of his employment at the time of the accident.

Damages

Harold Wibye. As a result of the accident, plaintiff Harold Wibye suffered a cerebral concussion resulting in loss of vision in his left eye and severe headaches, wrenching of the neck and upper back, with post traumatic parascapular myositis bilater-

ally, and other lacerations, abrasions and nervous shock. As the evidence showed, he was unable to follow any occupation for the 141 weeks between the accident and the trial. Medical testimony was that he would need further hospitalization for treatment of his neck and that further repairs to his knee, which had been severely lacerated, were required. The medical proof further showed that the injuries are of a permanent nature and that Harold Wibye will never be fit to follow his occupation. He was 40 years of age, and a superintendent of building construction, earning approximately \$125.00 per week at the time of the accident. Lost earnings amount to some \$17,625.00 and medical and hospital expenses were approximately \$2,160.00. After taking into account the nature of the injuries, the age of this plaintiff, his reasonable life expectancy, his lost earnings and medical expenses and the present value of his future loss of earnings, I have concluded that a proper award should be the sum of \$45,000.00.

Niels K. Wibye, Niels K. Wibye suffered more severe injuries than his brother. He also had a cerebral concussion and in addition a fracture of both hips and his right knee, resulting in considerable limitation of motion thereof. In addition, he suffered injury of the tendons of the right wrist and other deep and painful lacerations. He was confined to the hospital for many months, where he underwent surgery in an attempt to repair the fractures of the hips and knee. His injuries are

permanent in character. At the time of the accident, he was 41 years of age, and was a carpenter foreman, earning approximately \$100.00 a week. Loss of earnings at the time of the trial was \$14,000.00; medical and hospital expenses amounted to \$4,505.56. Taking into account his age, occupation, lost earnings, medical expenses, present value of his future loss of earnings, his reasonable life expectancy, and the nature of his injuries, my finding is that an award of \$60,000.00 would be proper.

Judgment may therefore be entered in favor of Niels K. Wibye for the sum of \$60,000.00; and in favor of Harold Wibye for \$45,000.00, upon findings of fact and conclusions of law to be presented in accordance with the Rules.

Dated: December 22, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed December 22, 1949.

[Title of District Court and Causes.]

Consolidated Cases No. 27732 and No. 27694-G

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly for hearing and trial on the 28th day of July, 1949, before the above-entitled Court, upon the complaints

of plaintiffs and the answers of the defendant United States of America, the Hon. Louis E. Goodman presiding, and the Court sitting without a jury; Messrs. Nichols, Richard, Allard & Williams and John D. Den-Dulk, Esq., and Eugene K. Sturgis, Esq., appearing as counsel for plaintiff Harold Wibye and Messrs. Nichols, Richard, Allard & Williams appearing as counsel for plaintiff Niels K. Wibye, by Paul B. Richard, Esq., and the United States Attorney General's office, by Daniel C. Deasy, Esq., appearing as counsel for defendant United States of America, and evidence both oral and documentary being offered and received by the Court, and the Court having heard the testimony, and the evidence having been closed and said cause having been submitted to the Court for its decision, and the Court having been fully advised in the premises, comes now the Court and renders the following Findings of Fact:

Findings of Fact

I.

That by an order duly made by the above-entitled Court and entered on the 3rd day of May, 1948, the above-entitled and numbered actions were consolidated for the purposes of the trial and subsequent proceedings pursuant to a stipulation made and entered into by counsel for the respective parties.

II.

That said actions were prosecuted pursuant to the provisions of that certain Act of Congress of

the United States of America, more generally known and designated as Federal Tort Claims Act (60 Stat. 843; 28 U.S.C. 931, et seq.).

III.

That it is true that on or about the 8th day of November, 1946, John E. Hadley, now deceased, was the agent, servant and employee of said defendant United States of America, and was on said date acting within the course and scope of his employment upon orders requiring him to visit various quartermaster depots and perform certain work there; that it is true that in accordance with said John E. Hadley's work schedule, it was his duty to proceed from Seattle, Washington, to the Stockton Quartermaster Depot, located at Lathrop, California, and upon completion of his assignment at Lathrop, California, to return to Fort Lewis, Washington, at which place he was scheduled to arrive on the 11th day of November, 1946; that it is true that on said 8th day of November, 1946, said John E. Hadley was operating and driving a certain Plymouth automobile owned by said defendant United States of America.

IV.

That it is true that on or about said 8th day of November, 1946, plaintiff Niels K. Wibye was riding as a guest in a certain Oldsmobile automobile, then and there being driven by plaintiff Harold Wibye; that said automobile was being driven in a general easterly direction on State Route No. 513,

at a point thereon approximately 2/10ths of a mile westerly of the intersection of State Route 513 with Dublin Road, in the County of Alameda, State of California; that at said time and place said defendant United States of America, acting by and through its agent, servant and employee John E. Hadley, now deceased, and John E. Hadley, now deceased, were then and there driving and operating a certain Plymouth automobile in a general westerly direction upon said State Route No. 513 at said location as aforesaid; that at said time and place defendant United States of America, acting by and through its agent, servant and employee, John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile as to cause it to and it did violently collide with the automobile in which plaintiffs were riding as aforesaid.

V.

That it is true that as a direct and proximate result of the carelessness and negligence of said defendant, as aforesaid, plaintiff Niels K. Wibye sustained the following personal injuries:

Cerebral concussion; fracture of both hips; fracture of the right knee resulting in considerable limitation of motion, and straining and spraining of the ligamentous tendons and tissues in the vicinity of said knee joint; deep laceration to the right wrist, severing three extensor tendons, resulting in limitation of motion in said wrist; deep laceration of the upper left arm requiring suturing and resulting in

partial severance of the tricept tendon; deep laceration of the left forearm requiring suturing; deep laceration of the left thumb requiring suturing; deep laceration in the left arm pit requiring suturing; severe blow to the mouth requiring the extraction of all of his upper teeth; severe nervous shock; multiple bruises and abrasions about said plaintiff's body generally; that all of the above injuries are permanent in character; that it is true that at the time of said accident plaintiff Niels K. Wibye was forty-one years of age and was a carpenter foreman, earning approximately \$100.00 a week; that it is true that the loss of earnings at the time of trial was in the sum of \$14,000.00; that it is true that plaintiff incurred obligations as and for hospitalization, physicians and surgeons services, general nursing care, X-rays, and medications in the sum of \$4,505.56; that said sum was the reasonable value of said services rendered; that it is true that plaintiff will continue to require further medical and hospital care and treatment.

VI.

That it is true that as a direct and proximate result of the carelessness and negligence of said defendant, as aforesaid, plaintiff Harold Wibye sustained the following personal injuries, to wit:

Severe cerebral concussion; loss of vision of the left eye, severe wrenching of the neck and upper back with post traumatic parascapular myositis bilaterally; lacerations of the anterior of the left patella requiring suturing; lacerations across the anterior of the right patella requiring suturing;

severe straining and spraining of the cervical area of the spine with traumatic cervical neuritis; severe injury to the internal organs of said plaintiff; cuts and abrasions about the face; deep contusions of the left chest and shoulder; that all of the above injuries are permanent in character; that at the time of said accident said Harold Wibye was forty years of age, and was superintendent of building construction, earning approximately \$125.00 per week; that at the time of trial, said loss of earnings were approximately \$17,625.00; that it is true that plaintiff has incurred obligations as and for hospitalization, physicians and surgeons services, general nursing care, X-rays, and medications in the sum of \$2,160.00; that said sum was the reasonable value of said services rendered; that it is true that plaintiff will require further hospitalization and medical treatment for his leg and knee.

VII.

That except as herein expressly found to the contrary, all of the allegations contained in each of plaintiffs' complaints are true, and except as herein expressly found to the contrary, all of the affirmative allegations of defendant's answers to each of said complaints are untrue.

From the foregoing findings of fact the Court makes the following conclusions of law, to wit:

Conclusions of Law

I.

That each of said plaintiffs are entitled to recover judgment against defendant United States of America herein.

II.

That judgment should be entered in favor of plaintiff Niels K. Wibye (Action No. 27694-G) in the sum of \$60,000.00, and in favor of Harold Wibye (Action No. 27732) in the sum of \$45,000.00, and that plaintiffs recover their costs of suit herein; and that judgment be entered accordingly.

Dated: January 5, 1950.

/s/ LOUIS GOODMAN,
Judge.

Affidavit of Service by Mail attached.

Lodged December 28, 1949.

[Endorsed]: Filed January 5, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division.

Consolidated Cases No. 27732 and No. 27694-G

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action coming on regularly for hearing and trial on the 28th day of July, 1949, before the above-entitled Court, upon the complaints of plaintiffs and the answers of the defendant United States of America, the Hon. Louis E. Goodman presiding, and the Court sitting without a jury; Messrs. Nichols, Richard, Allard & Williams and John D. Den-Dulk, Esq., and Eugene K. Sturgis, Esq., appearing as counsel for plaintiff Harold Wibye and Messrs. Nichols, Richard, Allard & Williams appearing as counsel for plaintiff Niels K. Wibye, by Paul B. Richard, Esq.; and the United States Attorney General's office, by Daniel C. Deasy, Esq., appearing as counsel for defendant United

States of America, and evidence having been closed and said cause having been fully submitted to the Court for its decision, and the Court having made findings of fact and having rendered its conclusions of law therein, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Niels K. Wibye (Action No. 27694-G) be awarded the sum of \$60,000.00, and that plaintiff Harold Wibye (Action No. 27732) be awarded the sum of \$45,000.00, and their costs of suit, against the defendant United States of America.

Done in Open Court this 5th day of January, 1950.

/s/ LOUIS GOODMAN,
Judge.

Lodged December 28, 1949.

[Endorsed]: Filed January 5, 1950.

[Title of District Court and Cause.]

No. 27694-G

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of Niels K. Wibye on January 6, 1950.

Dated: February 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant-
Appellant.

[Endorsed]: Filed February 7, 1950.

[Title of District Court and Cause.]

No. 27732-H

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of Harold Wibye on January 6, 1950.

February 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant-
Appellant.

[Endorsed]: Filed February 7, 1950.

[Title of District Court and Cause.]

No. 27694-G

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant, appellant herein, may have to and including the 5th day of May, 1950, to file the record on appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: March 22, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

No. 27732-H

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant, appellant herein, may have to and including the 5th day of May, 1950, to file the record on appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: March 22, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Causes.]

Consolidated Cases No. 27732-H and No. 27694-G

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

That the trial Court erred.

I.

In finding that John E. Hadley was acting within the course and scope of his employment as an agent, servant or employee of the United States of America at the time and date of the accident.

II.

That John E. Hadley was negligent.

III.

That the evidence of the mother of John E. Hadley was sufficient to establish that John E. Hadley was on Government business at the time of the accident.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant,
United States of America.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Causes.]

Consolidated Cases No. 27732-H and No. 27694-G

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court, and to
Messrs. Nichols, Richard & Allard, Attorneys
for Plaintiffs:

The defendant, United States of America, by its
attorney herein, hereby designates for inclusion in
the transcript of record upon appeal, the complete
record, and all the proceedings and evidence in the
action.

Dated: April 20, 1950.

/s/ FRANK J. HENNESSY,

United States Attorney, Attorney for Defendant,
United States of America.

[Endorsed]: Filed April 20, 1950.

[Title of District Court and Causes.]

No. 27694 G and No. 27732-H

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court
of the United States for the Northern District of
California, do hereby certify that the foregoing doc-
uments and accompanying exhibits listed below, are

the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled consolidated cases, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

In Case No. 27694-G

Complaint

Answer to Complaint

Amended Answer

Minute Order of July 28, 1949

—Trial

Minute Order of July 29, 1949

—Further Trial

Ordered Cause Be Submitted on Briefs
December 14, 1949

—Ordered Matter Be Submitted

Opinion

Findings of Fact and Conclusions of Law
Judgment

Notice of Appeal

Order Extending Time to Docket

Statement of Points to Be Relied Upon on
Appeal

Designation of Contents of Record on Appeal

In Case No. 27732-H

Complaint

Answer to Complaint

Amended Answer

Notice of Appeal

Order Extending Time to Docket

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 2nd
day of May, A. D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the District Court of the United States for the
Northern District of California, Southern Division

Before: Hon. Louis E. Goodman,
Judge.

Consolidated Cases No. 27732-H-No. 27694 G

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

July 28th and 29th, 1949

Appearances:

For the Plaintiff, Niels K. Wibye—

EUGENE K. STURGIS,

JOHN D. DEN-DULK,

NICHOLS, RICHARD, ALLARD &
WILLIAMS,

By PAUL B. RICHARDS, ESQ.

For Plaintiff Harold Wibye—

NICHOLS, RICHARD, ALLARD &
WILLIAMS.

For United States of America, the Defendant—

DANIEL DEASY,

Assistant United States Attorney.

The Clerk: Wibye versus United States.

Mr. Richard: Ready.

Mr. Deasy: Ready, your Honor.

The Court: You may proceed.

Mr. Richard: If your Honor please, you may recall that when the matter was called about six weeks ago, permission was given to file amended answers on certain issues. In other words, in the original pleadings, in the original answers that were filed, there was no denial of scope of employment of the person driving the government car. Your Honor at that time gave permission for the defendant to file an amended answer—an amendment to the answer—which has been done in both cases.

Now, I notice—I don't know why—but the language of the amendments in the two cases is somewhat different. Calling your attention, if your Honor please, to Number 27694, the Niels Wibye case, in which it is denied that John E. Hadley was at the time of the accident acting within the course or scope of his employment, or was an agent, servant, or employee of the defendant. Now, the

other answer simply denies at the time of the accident he was acting within the course and scope of his employment, the United States of America.

The understanding, I believe—and I think Mr. Deasy and I have agreed—is that since the only denial is that Hadley was acting within the course of his employment at the time—in other words, that there is no denial—that there was a government—that, of course, is admitted.

The Court: Or that the driver was in the government employ?

Mr. Richard: He was a government employee. The only issue is of the course and scope of employment.

Mr. Deasy: That's right. I can't account for the difference in language in amending those answers.

Mr. Richard: Mr. Harold Wibye, would you take the stand?

HAROLD E. WIBYE

called by the plaintiff; sworn.

Direct Examination

By Mr. Richard:

Q. Give your full name.

A. Harold E. Wibye.

Q. Where do you reside?

A. 1628 Brush Street, Oakland, California.

Q. On the 8th of November, 1946, the day of

(Testimony of Harold E. Wibye.)

the accident we are to discuss here, were you living at the same address?

A. No. At that time I was living at 4066 Patterson and working in San Leandro.

Q. That Patterson Street address is also in Oakland? A. Yes. [3*]

Q. What is your age? A. 43.

Q. Are you married or single?

A. Yes, sir; I am married.

Q. Do you have children? A. One.

Q. Now, on the 8th day of November, 1946, you were involved in an automobile accident, were you not? A. Yes, sir.

Q. Where, generally speaking, did that accident occur?

A. That accident happened on the down-grade of Pergola Hill, approximately six miles from San Leandro, or between the first left hand turn and in the straight-a-way before entering the right-hand turn, about a quarter way down the hill.

Q. This Pergola Hill that you speak of is a hill that is located—that is referred to very often by location? A. Yes, sir.

Q. Now, the highway that you were on is the main highway running between the City of Oakland down through Castro Valley, on down to Livermore and Tracy? A. That's right.

Q. That is correct, is it not? A. Yes, sir.

Q. And were you operating one of the automobiles involved in the accident? [4]

* Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of Harold E. Wibye.)

A. Yes, sir.

Q. What kind of a car were you operating, sir?

A. A 1941 Oldsmobile business coupe.

Q. Were you the owner of that automobile?

A. No, sir.

Q. Who was the owner of that automobile?

A. My brother, N. K. Wibye.

Q. And N. K. Wibye is the Niels——

A. Niels K. Wibye.

Q. (Continuing): ——who is the plaintiff in one of the actions here? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. He is your brother? A. Yes, sir.

Q. Will you tell us approximately the time of day or night the accident happened?

A. I believe it was between 4:35 and 4:40.

Q. In the afternoon?

A. In the afternoon of Friday.

Q. What was the condition of the weather on that afternoon, Mr. Wibye? A. Clear.

Q. Now, generally speaking, in what direction does that [5] highway run?

A. I would say east and west; west to Oakland and east to Bakersfield.

Q. And the direction in which you were traveling was which way? A. East.

Q. What was your destination?

A. Bakersfield, California.

Q. Where had you come from? Where had you started out that afternoon?

(Testimony of Harold E. Wibye.)

A. We had left 151 Street and San Leandro. In other words, it was the site of our job.

Q. That you were working on?

A. I beg your pardon?

Q. The site of the job that you were working on at the time? A. Yes, sir.

Q. Now, you said "151 Street." That is 151st Avenue, is it not?

A. Approximately 151st Avenue.

Q. All right. And you were going generally in an easterly direction? A. Yes, sir.

Q. At the location where the accident took place, how many lanes or traveled portions—how many lanes for automobiles are there? [6]

A. Three lanes at the location of the accident.

Q. Are those lanes in anywise marked by white lines or otherwise?

A. They are clearly defined by two white lines dividing the three lanes, single lanes.

Q. Three lanes. Now, in the automobile at the time were who? A. My brother and I.

Q. All right. On the last quarter of a mile prior to the happening of this accident, in which lane of travel was your car being operated?

A. The extreme right hand lane.

Q. Can you tell me whether or not at all times in that last quarter of a mile clear up to the time of the happening of the accident itself, your car was in any other lane upon the highway?

A. No, it was always in the extreme right-hand lane.

(Testimony of Harold E. Wibye.)

Q. And at the time of the happening of the accident likewise? A. I beg your pardon?

Q. At the time of the happening of the accident, you were in which lane?

A. I was within six inches of the edge of the black top.

Q. When you speak of six inches of the edge, you are referring to which edge?

A. That is the right-hand edge. [7]

Q. The black top is the—— A. Macadam.

Q. The traveled main portion of the highway?

A. Yes, sir.

Q. With this shoulder that you speak of on the side? A. That is correct.

Q. And, in that last quarter of a mile, will you give me your best judgment as to the highest speed that you traveled?

A. Approximately 50 miles an hour.

Q. Now, you were involved in a collision with another automobile, were you not?

A. Yes, sir.

Q. Did you see that automobile before the collision? A. Yes, I did.

Q. Which direction was it traveling, sir?

A. It was traveling west on Highway 50.

Q. In the opposite direction? A. Yes, sir.

Q. When you first observed it, approximately how far distant was it?

A. I believe it was about 120 to 150 feet from me.

Q. When you first noticed it at all?

(Testimony of Harold E. Wibye.)

A. Yes, sir.

Q. Was there some traffic upon the highway at about that time? [8]

A. Well, I had only passed one car traveling in a westerly direction on the hill coming down. Traffic was light, I would say, at that time.

Q. Did you notice, generally coming from the opposite direction, some automobiles?

A. A few.

Q. About the time of the accident?

A. Yes, there were very few cars at that time.

Q. The first time you noticed this automobile as such, you would say it was a hundred twenty or twenty-five feet away? A. Yes, sir.

Q. What lane of traffic was it in when you first noticed it?

A. In the extreme right-hand lane coming toward me.

Q. So that the middle or center lane separated the two cars? A. Yes, sir.

Q. Were you able at any time to estimate the speed at which that automobile was traveling?

A. I would say he was traveling approximately the same speed I was.

Q. Now, after first noticing that automobile, will you tell us the course that it pursued, just what you saw it do up to the time this collision took place?

A. Well, when I first observed the car, it was in the extreme right-hand lane; and upon crossing about 35 or 40 feet, it gradually veered about two

(Testimony of Harold E. Wibye.)

feet into the center lane [9] crossing the white line about two feet; and then it made a sharp left-hand turn, cutting clear across the center lane and striking the inside of the right front wheel of our automobile.

Q. Now, having observed——

The Court: The right front wheel?

The Witness: Right front wheel.

Q. You were traveling eastward?

A. I was traveling east.

Q. (By Mr. Richard): In other words, he cut across in front of you and the main contact was on your right-hand side?

The Court: In front of you. I see.

The Witness: Yes. He practically cut clear in front of me and hit the right-hand front wheel.

Q. (By Mr. Richard): When you observed the car deviate and turn from its lane towards you, what, if anything, did you do?

A. Applied the brakes.

Q. Was your car traveling when the accident happened? A. Traveling?

Q. Yes.

The Court: Was your car moving?

A. Yes, sir.

Q. (By Mr. Richard): Your car hadn't been brought to a stop? A. No, sir. [10]

Q. Did you have any judgment as to the speed of your car at the moment of the accident?

A. No, sir. I don't know how much brakeage

(Testimony of Harold E. Wibye.)

I had on the car at the time of applying the brake.

Q. I see.

A. There was no swerve to my car. I didn't apply the brake very heavily, but it was enough to leave a slight tire mark on the black top.

Q. On the pavement? A. Yes.

Q. Did you see that mark upon the pavement yourself, or is that something you have been told since?

A. No, sir; I saw it in a picture of the accident.

Q. I see; but you did not see it upon the highway yourself? A. No.

Q. All right. Now, what portion, if you know, of the other car was involved in a collision with the right front of your car?

A. His right front end.

Q. All right. Now, upon the happening of the accident itself, were you or were you not rendered unconscious?

A. Upon the impact of the accident?

Q. Yes. A. Yes, sir.

Q. You were rendered unconscious? [11]

A. Yes, sir.

Q. Did you have any recollection of anything that happened at the scene of the accident after the actual collision?

A. No, sir; nothing at all.

Q. Do you remember being transported in an ambulance from the scene of the accident?

A. No, sir.

(Testimony of Harold E. Wibye.)

Q. Do you have any recollection of being at Fairmont Hospital? A. No, sir; I don't.

Q. Well, do you have any recollection at all of being anywhere until you were in a hospital in Oakland?

The Court: I think what he means is: When did you recover consciousness?

Q. (By Mr. Richard): When did you come to? That's right.

A. In my bed in the hospital room.

Q. What hospital was it?

A. Providence Hospital, in Oakland.

Q. Do you know whether or not that was the same day or night of the accident?

A. No, I don't.

Q. That you came to? A. No.

Q. You do not? A. No, sir. [12]

Q. All right. Now, did you receive personal injuries in that accident, Mr. Wibye?

A. Yes, sir.

Q. Will you, generally speaking, starting right at the top of your head and going right down, detail to us the injuries that you yourself received?

A. Yes, sir. In the accident, I took the impact on three points of my body, generally. First was my head and my forehead.

Q. You are indicating the left side of your head?

A. Yes, my forehead was shattered from my hair line through my eyebrow, and the nerve was cut and shattered. My head had broken the windshield

(Testimony of Harold E. Wibye.)

out, and I have a slight indentation of my forehead here, and a roughness of the eyebrow line.

Q. You are indicating the left side of your forehead, just above the left eyebrow?

A. That is the left side. Since that time, I have had severe headaches through my left temple and a numbness of the crash area on my forehead, possibly over a period of a year and a half since the accident. Approximately two years and nine months have elapsed and the numbness has gradually become cleared up and that has become sensitive in that area. There is no numbness in that area at the present time. [13]

Over a period of possibly two years, I had severe headaches, and any exertion such as walking up a stairs or standing for a while, movement, or getting up out of the bed quickly, or from a chair, causes dizziness and blackouts.

I have had severe pains and cramps, more or less of a measure, and a swelling at the base of my brain on both sides; and also a lump on the right-hand cord of my neck.

Over a period of possibly two years, four months, I have had intermittent swelling of the cords, in these cords of my neck and at the base of the brain and I believe that Dr. Fisher recommended that I take heat and massage treatments for it; and over a period of a year and a half, I believe I have had fifty heat and massage treatments at 520 Sutter Massage Parlor, and also eight or ten treatments in Oakland, California, with a physiotherapist.

(Testimony of Harold E. Wibye.)

The heat and massage was very agreeable to the neck; the swelling goes down—and although it goes down, it is down for a week or two and then it gradually creeps back up in my neck, and I sit here in court today with a swelling in my neck. The left-hand is solid. There is not as much swelling in this side, but I do have pressure feeling and pains there at the base of my brain right now.

Cramps set in at the base of my brain and fluctuate—intermittent cramps, which will start up here, possibly, [14] and tighten up and terminate in shooting pains, more or less a shooting pain, just traveling directly upward into my head.

In the crash, somehow or other, the ring was torn off this steering wheel and the spokes evidently lay each side on my chest; and in the impact, the steering post was folded up into the windshield and the spokes of the steering wheel were bent down vertical, parallel to the windshield; and while in the hospital, I had severe pains in my chest cavity; and after leaving the hospital, Dr. Fisher put more or less of a chest—it looked like a brassiere—a harness around my chest to alleviate the pain in my chest. I believe I carried my left arm in a sling for about three weeks due to torn ligaments in my left arm.

I have cramps in the thoracic section of my back and also intermittent or fluctuating shooting pains that start in the region of the back and terminate somewhere in the front, possibly somewhere through the chest cavity.

(Testimony of Harold E. Wibye.)

While in the hospital, my vision was very poor. I couldn't even read the headlines of the newspaper; and since that time, my vision has been fluctuating from good to bad.

Q. Any difficulty with the ears?

A. I have a constant ringing in my ears which has never stopped since the accident. I sit here now with the ringing [15] in my ears. It is about as loud as a steam valve popping on a hot water system radiator. It is constant.

At times, I have a nausea to my stomach, or cramping such as you have when you want to vomit and still I have no vomiting. Instead of vomiting, my salivary glands flow and—well, a lot of times, I am in a position where I can't spit and my mouth feels practically full of saliva. On one occasion, the smell of food has caused me to vomit and nauseated me to the extent that I couldn't eat for several days. I don't know what the situation was.

Over a period of two years, I lacked the ability to sleep, and I received sedatives from Dr. Fisher, Dr. Shock, Dr. Libbey, Dr. Norcross.

Q. Any other doctors that prescribed sedatives other than the ones you have mentioned, so far as you can recall?

A. I have been to Dr. Weisenfeld and Dr. Johns; and my last visit to Dr. Fisher was—oh, some time in June.

Q. Of this year?

A. Of this year. And at that time, I was feel-

(Testimony of Harold E. Wibye.)

ing very—I was feeling very good. I had felt good for a period of three weeks; and in giving me a check-up, I was put through the paces of a left-hand turn, a right-hand turn as far as I could turn, and my head was forced over to the right to a full 90 degrees in a forward bend and a backward bend; and within a half hour after I left his [16] office, swelling set in in my neck and a throbbing of the brain, just like beating on it with a hammer. I could feel the pulse beat every beat of my heart; and I went back to Dr. Fisher the next morning for some sedative or pain pills. I don't know what they were. They were very effective in killing the pain.

Since that time, which was in June, I have had the swelling in my neck, and come here to court today with it still in the base of my brain.

Q. Mr. Wibye, was there any injury down in your low back? When you spoke of these pains that go through the chest, was there any injury to the low back?

A. No, sir. I have no injury below the waistline, with the exception of about eight or twelve inches of lacerations upon my knees where my knees were driven in the dashboard.

Q. Was there any suture performed?

A. Yes, sir. I believe there were about forty stitches in my knees.

Q. Do you have any recollection of the sutures being placed there?

(Testimony of Harold E. Wibye.)

A. No, sir; I have no recollection until the time I came to in my hospital bed.

Q. And that had already been performed?

A. That had already been performed.

Q. Now, there is a scar there? [17]

A. Yes, sir; I have scars on the right——

Q. I—— A. I beg your pardon?

Q. On the left knee?

A. On the right and the left knee; and also, I think there was some break or fracture which caused a raising of the left kneecap.

Q. Will you just show to the Court and counsel the scar that you have there on the left knee?

A. You will have to look at both knees to see the different in the knee.

Q. In other words, you got a knob up here, you mean?

A. Yes, sir. I can't get down on my knees because that point is the only point of contact, and that knee is very sensitive. I can get down on this knee (indicating); but this one is very sensitive that way.

Q. The suture was in the left knee?

A. I believe about forty stitches; about a five or six-inch cut around here in a half moon; and then this cut about three inches and a half across there (indicating).

Q. Now, the areas that you notice upon both knees there that are discolored, were the result of this accident? A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. They did not exist before?

A. No, sir. [18]

Q. You say you were unable to get down upon the left knee?

A. Yes, sir. I can't put my——

The Court: You mean you can't kneel on it?

A. No, I have fully a 90 bend of my knees—rather of my legs—but I have a very painful kneecap.

Q. (By Mr. Richard): What about the right knee? Are you able to get down on it?

A. Yes, sir; that is normal. It is very sensitive. You can see the incisions directly across the kneecap, and with a pad, I can get down on it. This knee, I can't (indicating).

Q. Now, have you outlined to us generally the injuries that you received in this accident, Mr. Wibye? Of course, your doctor will be here to testify also.

Now, will you tell us, after the accident for how long a period you were confined to Providence Hospital?

A. I was confined to the Providence Hospital for a period of eight days—I believe from November 8, 1946, to about November 16th or 17th, 1946; and then——

Q. Where did you go then?

A. I beg your pardon?

Q. Where did you go from the hospital?

A. I went to—I was hobbling around at that

(Testimony of Harold E. Wibye.)

time, and I had to get some place where I wouldn't have to walk upstairs or bend my knees. I couldn't bend my knees. I left the hospital with stitches in my knee; they had not [19] been removed; and I went to the American Motel.

Q. In Oakland?

A. In Oakland, California.

Q. Where was your family at that time?

A. My wife was at Bakersfield.

Q. Were you able to take care of yourself when you left the hospital and went to the American Motel? A. No, sir.

Q. Did you engage someone to assist you?

A. Yes, sir; I employed some special care.

Q. Was that a male practical nurse?

A. Yes, sir.

Q. How long did he remain with you?

A. Five weeks.

Q. Now, after the end of five weeks, where did you go after leaving—withdraw that. You remained at the Motel how long?

A. I believe a period of ten or fifteen days; and then I moved down to the Providence Hotel.

Q. And this male nurse accompanied you?

A. Yes, sir.

Q. And after a period of being in this hotel, did you finally return to Bakersfield?

A. No, sir; my wife came to Oakland.

Q. Incidentally, you say your wife was down in Bakersfield, [20] but did you have a home down there, a house or an apartment?

(Testimony of Harold E. Wibye.)

A. I had a house trailer.

Q. You had a house trailer? A. Yes, sir.

Q. And that is one of the reasons you did not go down to Bakersfield any sooner than you did, is that right? A. That is correct; yes, sir.

Q. All right. Now, were you in any hospital later on for treatment as a result of the injuries in this accident?

A. Yes, sir. I believe it was on October 25th of 1948, I spent five or six days in Providence Hospital taking traction under observation of Dr. Fisher.

Q. The traction was applied where?

A. The traction—well, they put your head in a halter with a rope and pulleys on it, and——

Q. Well, the traction was applied to the neck?

A. To the neck; yes, sir.

Q. All right; and you were in there for some four or five days? A. Yes, sir.

Q. Now, you spoke of physiotherapy treatments that you had from time to time, you believe numbering about fifty?

A. I would say I had fifty-five in the physiotherapy parlors; and at the same time, after that, in other places, I was taking ultra-violet treatments at home, and electric [21] pad heat at home.

Q. Now, after having this neck stretching and traction upon the neck in the hospital, did Dr. Fisher prescribe any home treatment for you in the way of stretching? A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. Either before or after you were in the hospital this second time?

A. After I was in the hospital, I continued the traction for a period of about seven days and the swelling was removed, and my neck was in good condition for about four days and the swelling returned, and I used traction again for, I think, fourteen days.

Q. Did you purchase brace of some kind for that purpose?

A. No, I made a head halter and had the weight pulleys at home.

Q. You did that under Dr. Fisher's suggestion and direction, is that right?

A. Yes, sir.

Q. Do you still use that?

A. No, I have not used it since June, about June 1st.

Q. Of this year?

A. Of this year.

Q. Now, you incurred, did you not, as a result of this accident, in connection with your care and treatment, certain obligations, certain bills, for doctors and hospital and [22] ambulance, X-rays, nursing care, and incidentals, is that correct?

A. Yes, sir.

Q. I hand you here a typewritten list and ask you to look over that (handing to witness). Is that a true and correct list?

A. Yes, sir.

Q. You gave those items to determine what made up the list?

A. Yes, sir.

Mr. Richard: Those total \$174.66. Is there any

(Testimony of Harold E. Wibye.)

question there, Mr. Deasy, about any of those items that you want to discuss?

Mr. Deasy: I might want to ask him about it.

Mr. Richard: All right.

If your Honor please, we offer this in evidence. If there is a question of reasonableness——

The Clerk: Exhibit One.

(List of Medical Expenses, Harold Wibye, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Richard): Mr. Wibye, at the time of the happening of this accident, what was your business or occupation?

A. I was Superintendent of Construction for the East Bay Construction Company of San Leandro.

Q. Were you actually engaged upon a job at the time of the happening of this accident? I mean, had you worked upon [23] this particular day?

A. Yes, sir.

Q. And for this organization? A. Yes, sir.

Q. At a job, you said, somewhere near 151st Avenue in San Leandro?

A. Yes, sir; in that vicinity.

Q. And, generally speaking, what were your duties, or what did you do on that job?

A. Well, my duties were to expedite the progress of the work; to keep materials on the job for the men; order concrete; and——

Q. Well, you were designated as what, Construction Superintendent?

(Testimony of Harold E. Wibye.)

A. Construction Superintendent.

Q. All right. At the time of the happening of this accident upon this particular job, what was your weekly compensation?

A. My weekly compensation was one twenty-five a week.

Q. Was that gross?

A. That was gross. The net was \$105.30.

Q. Was that for a 40-hour week?

A. That was for a 40-hour week.

Q. In other words, five days a week, six hours per day?

A. Yes, sir. [24]

Q. Now, generally speaking, for the last—oh, say, eight or ten years before the happening of this accident, what had been your business or occupation?

A. Construction work had been my business for the last ten years.

Q. And will you just tell the Court generally and—oh, say, since 1939 or 1940, the type of work and the kind of jobs you have been on?

A. Well, the last job was with the East Bay Construction Company, and I was rated as an Assistant Superintendent at \$125 per week. I just left a job in Bakersfield working for a contractor by the name of O. D. Williams. I was Building Superintendent, and I had the alternative of taking a flat salary of \$150 a week or an hourly basis. Consequently, I took the hourly basis because I had the opportunity to make from \$160 to \$200 per week.

Q. What kind of job was that?

(Testimony of Harold E. Wibye.)

A. I was Superintendent of the Bell Telephone Building at Bakersfield.

Q. That is a new building that was being constructed?

A. It was a new building. I started the building and I finished the building.

Q. And that took approximately how long?

A. Oh, I believe I was there three months on the project. I had come in from Inyokern where I had been working for [25] N.O.T.S.—that is, the Naval Ordnance Test Training *Training* Station, for approximately a year and a half; and my capacity on that job was general carpenter-foreman; and also on another unit, it was Area Superintendent. My salary on that job was \$125 gross. I believe I was there at the Navy base for approximately a year and a half. I was shipped out here from—I was shipped out to the Navy Base from Houston, Texas, where I had just completed a job, I believe with the Brown and Root Construction Company, and I was rated as General Steel Foreman on that job. I had the alternative of taking a base pay of one twenty-five, or an hourly basis; and in preference to the salary, I took the hourly basis because I had the opportunity to make from \$150 to \$200 a week.

Q. And did you make that on that job?

A. Yes, sir; a period of eighteen months.

Q. That was what kind of a job; that is, what was the construction?

(Testimony of Harold E. Wibye.)

A. The construction was concrete and steel. I was General Steel Foreman, and I was installing vertical flood gates on the Brazos River and the Matagorda Bay.

The job prior to that was working for the Tel-Epson Construction Company at Freeport, Assistant Superintendent to Jack Hale, at a salary of \$125 per week, and I worked for the company approximately 14 or 16 months. [26]

Q. This takes us back, then, several years before the happening of this accident?

A. That is back to 1941.

Q. And even before the war, were you engaged in this same line of business?

A. Yes, sir. I worked on locks and dams on the Mississippi River, starting at St. Paul on down the Mississippi River to St. Louis, and I had various jobs, such as carpenter foreman, shop foreman, sheet pile foreman; and at one time when I started out, I started out working as a carpenter under a Carpenter Union card.

The Court: How long have you been married?

A. I beg your pardon?

Q. How long have you been married?

A. Nine years.

Q. And how old is the child?

A. Seven years.

Q. (By Mr. Richard): Generally speaking, for the last eight or ten years before the accident, the things you have detailed, the work that you have

(Testimony of Harold E. Wibye.)

done, and your income or salary would range—is it a fair statement—from one hundred a week up?

A. Oh; yes, sir. My base has been the equivalent of \$125, and running much higher than that. During the work throughout the war, we worked long hours and had the opportunity to make \$200 to \$230 a week. [27]

Q. But even before the war, you had been receiving a base pay in the vicinity of \$125 a week?

A. Yes.

Q. All right, sir. Now, have you done any work of any kind, that is, for remuneration for any pay since the happening of this accident?

A. No, sir. I have received no wages or salary since November 8, 1946. I tried to go to work on two occasions and I just couldn't make it.

Q. What, particularly, Mr. Wibye, upon these occasions that you have endeavored that has prevented you from carrying on work?

A. Well, I tried to go to work for the East Bay Construction Company and I was supposed to supervise the installation of a storm ditch. The ditch was fifteen feet wide and about ten feet deep, and I believe it was about February 10th that I went out to the job and I walked down in the ditch and I, at that time, was still very lame in my left knee, and I believe that some of these stitches had been left in the flesh. The surface stitch had been torn off and I developed two or three boils—or rather infected spots to my knees—which were swelling at

(Testimony of Harold E. Wibye.)

that time, and it was very painful to walk, but still I tried to go to work. In coming out of the ditch—the bank is only about ten feet high—I suffered a slight blackout and dizziness; and also at that time I was still [28] having severe pains between my shoulder blades in my back. I believe I was there three hours and I told the foreman that I was going to give it up, and I never went back to the job.

Q. Then you tried it upon another occasion?

A. Yes, sir. I actually tried to work for about two and a half hours and——

Q. That was upon what type of job?

A. I was working for myself. I tried to place some two by twelves in place.

Q. That is at your own residence?

A. Yes, sir; and I couldn't make it at that time. My—well, I have an internal quivering which has never left me and physical strain causes it to break out into practically a shaking palsy; and at that time, I practically broke down and I stayed in bed about three days after that, and I developed hemorrhoid at that time just from the strain of lifting. While I was in the hospital, for the eight days I was there, I believe I had two bowel movements, and I hemorrhaged a quantity of blood in the first bowel movement; and in the first three or four or five months I was in the hospital, I went to Dr. Fisher, and he recommended that I go to a Dr. Libby. I went to Dr. Libby, and he told me there was nothing to be worried about, it was just possibly a couple

(Testimony of Harold E. Wibye.)

of cracks in my colon which was causing the trouble and that it would eventually disappear. Well, since that time, and over a period of two and a half years, I have been having a compaction of it in the colon and I have been forced to take enemas on an average of two to three times a week.

Q. Did that condition exist before the happening of the accident?

A. No, after the accident.

Q. Did that condition exist before the happening of the accident at all? A. No, sir.

Q. Generally speaking, what was your condition of health, Mr. Wibye, before this accident happened? A. It was very good.

Q. And you had been regularly employed?

A. Yes, sir.

Q. And had not had any—but I don't want to lead the witness——

Had you had layoffs on account of illness or sickness in the last ten years?

A. No, sir. I believe I took two months off to go deer hunting in '45; and I had two months and about possibly two weeks between jobs—that is, two months after the accident—I was off in '46 and possibly two weeks between jobs. My net earnings—my gross earnings for '46 was approximately \$3600—well, with the ten weeks off for [30] hospitalization, it was three to two weeks between jobs.

Q. Mr. Wibye, had you ever been injured physically in an accident before? A. No.

(Testimony of Harold E. Wibye.)

Q. Or made any claim against anyone for damages arising out of an accident involving physical injury? A. No, sir.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Mr. Wibye, referring to this itemization of medical expenses that you have seen here—counsel gave me a copy of it—— A. Yes, sir.

Q. (Continuing): There appear dates in here without the years, for Dr. Fisher, for \$100, Providence. I assume that is for 1946, starting with twelve, thirty, is that right, the top items, Mr.—

Mr. Richard: We had better give him the sheet.

Q. (By Mr. Deasy): Those first six items appearing, are for 1946, is that right?

A. Yes, sir.

Q. And the remainder, down to the one which appears “Ambulance service, moving,”—now that is also 1946, I assume?

A. Yes, sir; that would be correct. [31]

Q. Now, there appears two items for transfusions. Those were blood transfusions you received in Providence Hospital, are they?

A. No; I believe those are for blood transfusions I paid for for my brother while he was laid up.

Q. (By Mr. Richard): That you paid for, for him? A. Yes, sir.

Mr. Richard: Then they are on the wrong list.

(Testimony of Harold E. Wibye.)

Q. (By Mr. Deasy): I just wondered seeing those there, because you hadn't testified to having received any blood transfusions.

A. Yes, sir. Well, if I had, I wouldn't have known it, I don't believe, because I didn't come to for a day or two.

Q. Now, the item "Nursing and care, \$300," is that the practical nurse which you spoke of in your testimony that went with you?

A. Yes, sir; he was on twenty-four-hour service.

Q. And he was with you for, I think you said—what was it, five weeks? A. Five weeks.

Q. Yes; and that was the total amount of his bill for those services, is that right?

A. Yes, sir.

Q. And the next item, "American Motel, \$175." That is for the period of, you said, ten or fifteen days you were in the [32] motel; is that right?

A. That—yes; but that covers the rental over a period of five weeks. I believe I was there ten or fifteen days, incurring a bill of about \$80 which I paid; and then that also includes a bill from the St. Mark Hotel.

Q. The St. Mark Hotel?

A. The St. Mark Hotel of Oakland.

Q. Is that where you went after you were in the motel? A. Yes, sir.

Q. I understood you to say Providence Hotel, I guess.

A. That's the Providence Hospital.

(Testimony of Harold E. Wibye.)

Q. That should be St. Mark Hotel?

A. St. Mark Hotel is correct.

Q. Now, I notice a bill from Dr. Norcross. What did Dr. Norcross treat you for?

A. Dr. Norcross is a brain specialist. He examined me in the hospital. What he did there, I don't know at the time I saw him.

Q. Was he called in by Dr. Fisher?

A. He was called in by Dr. Fisher as a consultant; but I did go to his office on two different occasions on which he prescribed—I believe he prescribed phenobarbital and sedatives of some type. I went to Dr. Norcross because my vision was fluctuating, and at that time I was seeing nothing but heat waves arising and black spots; and I was having [33] severe pains between my shoulder blades, and shooting pains in my back; and he examined me and prescribed two, or four prescriptions, I believe.

Q. Then, there appears an item for Dr. Weisenfeld, Nose and Throat, during March of 1947. Were you having trouble? What was that for?

A. At that time, I was having severe headaches and I told Dr. Fisher I wanted to go to an eye specialist, and he recommended Dr. Weisenfeld; and I believe Dr. Weisenfeld took X-rays of my head to determine the cause of the headaches, and found the X-rays negative. He gave me a prescription of sleeping pills and, I believe, sedatives. I don't know what it was. It was a prescription.

(Testimony of Harold E. Wibye.)

Q. Then I notice——

A. I beg your pardon. He also pulled the sutures out of my knees. I believe that one time Dr. Fisher was out of town. As I testified, I had three infected spots on my knees which looked like boils, and Dr. Fisher was out of town, and I went to Dr. Weisenfeld and I believe he lanced me with a scapula and removed the pus.

Q. Did Dr. Bartscher—did you go to him for something that occurred as a result of the accident?

A. Yes, sir. Dr. Bartscher is a dentist and I went to him to have a molar—half a molar was broken off during the impact of the wreck and he squared the tooth up and put [34] a gold crown on it. I think the sum was \$10.

Q. The tooth was broken at the time of the impact?

A. Yes, sir; and then two teeth—well, I think I had one or two loose fillings from the wreck. They took the fillings out and killed the nerves and treated—I don't know what the process was.

Q. Then there is another item here in July of 1947, Dr. High, dental work. What was that for?

A. That was for the removal of the loose fillings.

Q. Did the doctor tell you that these fillings were loosened as a result of the accident?

A. I didn't tell the doctor anything about it. The fillings were loosened and I had them replaced.

Q. And these items for Drs. Nutting and Gump that appear here; that was for examination of your eyes, for glasses?

(Testimony of Harold E. Wibye.)

A. Yes, sir; for fluctuating vision; yes, sir.

Q. And they prescribed glasses for you, is that right?

A. Yes, sir.

Q. And there is another item for Dr. High which appears without a date here, in the amount of \$20.

A. That was for examination.

Q. Do you recall when that was?

A. Sometime the first part of this year.

Q. That was in 1949, approximately?

A. Yes, sir. [35]

Q. Did you testify concerning Dr. Libby's treatment?

A. Yes, sir. I went to Dr. Libby when I was having trouble with my rectum and he examined my rectum, prescribed phenobarbital and nerve pills.

Q. And then there is an item "Dr. Hatcheck."

A. Dr. Hatcheck, X-ray.

Q. That is X-rays?

A. Possibly for Dr. Fisher.

Q. The second item for Dr. Hatcheck, I assume, is X-rays taken recently?

A. I don't know. Not recently; at a later date, possibly.

Q. You see there is one at the top of the list here taken in March of 1947 for \$12.50; and this one is without a date here.

A. I had trouble over a period of two years there, and I returned to the doctor several times and he took X-rays on several occasions.

Q. And had Dr. Schock billed you?

(Testimony of Harold E. Wibye.)

A. I believe the doctor put in forty stitches in my knees; and also I stopped to see him once or twice when Dr. Fisher was out of town. He gave me a prescription of phenobarbital and a couple of hypos.

Q. This item for Dr. Burrell, physiotherapy. That was in connection with the trouble in your neck; is that right?

A. Yes, sir. That is heat and massage. [36]

Q. Yes; and the additional item for Dr. Weisenfeld for \$5.00. Now, there is a bill here for Dr. Fisher for a report. Now can you tell us what that is, Mr. Wibye, the second to the last item?

A. I don't know. That must be an error.

Q. Now, you say that, to date, since the accident, you have been unable to resume your occupation, is that right?

A. That is correct.

Q. And have the doctors told you whether or not you will be able to resume your occupation, or when you could be expected to go back to your regular line of work?

A. No, sir; I haven't discussed it with any of the doctors. I haven't taken it up with any doctors. My only purpose in visiting the doctor was to secure relief.

Q. You mentioned, I think, in your testimony, that since the accident, you had a sort of internal quivvering that would break out from time to time. Is that a sort of a nervousness, a nervous condition?

(Testimony of Harold E. Wibye.)

A. Well, on October 10 of '49, I went over to the doctor. I tried to get in to see Dr. Naffziger who is attached to the University of California. I had heard he was a very good back specialist, and I got sidetracked to Dr. Jones and had an examination, and he told me that that possibly was due to shock and nervousness—being of light complexion, that you are very—I was a very nervous type and it wouldn't take [37] much to aggravate it and that possibly it was directly due to shock, is what he told me. He also told me that I was suffering from a cervical strain, and he, too, recommended that I go to the hospital and have traction for the existing condition.

Q. How many times did you go to see Dr. Jones?

A. I believe I was in Dr. Jones' office twice; once for the examination and once after the examination.

Q. Did you succeed on either occasion in seeing Dr. Naffziger? A. No, sir.

Q. Is he associated with Dr. Jones?

A. Yes, sir.

Q. And they sent you a bill for their services in the sum of \$75; is that right? A. Yes, sir.

Q. Now, you say that at the time of the accident, you observed this car approaching in the opposite direction and you estimate he was coming at about the same speed that you were traveling?

A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. Is that a normal speed for traffic in that section of the highway?

A. Yes, sir. In fact, I believe the uphill traffic travels much faster than downhill traffic, because they are all trying to make the grade going uphill.

Q. And at the point where this accident happened, is there a hill there? [38]

A. A gradual incline down. Off the road or on the road?

A. No, I mean lengthwise of the road.

A. Yes, sir; I would say about a ten-degree—seven to ten-degree.

Q. Were you traveling upgrade or downgrade at the time? A. Slightly down grade.

Q. You were traveling downgrade?

A. Yes, sir.

Q. And then the other car was coming upgrade, is that right? A. Yes, sir.

Q. And is there a curve in the road at the point where the accident happened?

A. Yes, sir. There are two curves. I had just completed a left-hand turn and entered a straight-a-way, and I imagine the straight-a-way was about 200 to 250 feet, and it goes to a right-hand turn.

Q. That is for you, is that right?

A. Yes, sir.

Q. Yes. The other car, then, would simply have been just completing a left-hand turn; is that right?

A. A slight turn; yes, sir—a curve.

Q. And you saw this car coming, then were you able to observe what kind of a car it was?

(Testimony of Harold E. Wibye.)

A. No, it was an olive-drab car.

Q. There was nothing particular conspicuous about it, but it [39] was an automobile coming along towards you, is that right?

A. That is all; yes.

Q. And you say that when he was some thirty-five or forty feet away that the car gradually crept over into the center lane of the highway?

A. No, I said that the cars crossed about—we crossed about thirty-five or forty feet, and in that distance he cut possibly two feet across the white line and then made a sharp left—sharp left-hand turn into the extreme right-hand side lane going east.

Q. And his car went right across in front of your car, didn't it, so that your car ran into the left side of the other car at the front?

A. No, his right side facing the front was the first point of impact with my right side, just inside of the front wheel.

Q. I mean he didn't run into the side of your car; he ran in front of it, isn't that right?

A. Yes, sir.

Q. And you were rendered unconscious by reason of your head striking the——

A. Windshield.

Q. (Continuing): ——windshield of the car?

A. Yes, sir.

Q. And at the same time, you say that your chest was thrown against the steering wheel breaking the wheel off? [40]

(Testimony of Harold E. Wibye.)

A. That is correct.

Q. And bending the column up towards the steering gear? A. Yes, sir.

Q. And your knees obviously?

A. Into the dash.

Q. Struck into the dashboard?

A. Yes, sir.

Q. Do you have a distinct recollection of applying the brakes on your car, or has your testimony in that regard been affected by your having seen pictures of the scene of the accident showing skid marks on the road?

A. At the time of the accident, I didn't have much recollection of anything until after three or four days till my mind started to clear up, and I absolutely—if I have a recollection of applying the brakes——

Q. Do you recall a police officer or highway patrol officer questioning you regarding the accident some time after, some few days, I think, after it happened?

A. No, sir. It seems to me that there was a highway officer in my room at the hospital, but I don't have any recollection of it.

Q. You were still in a dazed condition at the time you talked to him?

A. I believe they were still giving me pills and hypos and sedatives—well, they were slugging me generally with drugs, [41] I think.

Q. Now, you referred in your testimony several

(Testimony of Harold E. Wibye.)

times to having pains in the area at the base of the brain. A. That is correct.

Q. Has the doctor told you that they were at the base of the brain, or are you just using that in some descriptive sense?

A. The doctor hasn't told me anything at all. That is a descriptive feeling I get of it. I had the swelling back here, and the throbbing is across this line here (indicating)—and, well, it's my——

The Court: The pain is in your neck? You have described the place in your neck as being about the point where you think the base of the brain is. Is that it?

A. Yes; from the base of the brain to this large vertebra.

Q. (By Mr. Deasy): What you actually are referring to is the base of the skull?

A. That is correct.

Q. Back where your neck and head joins together? A. That is correct; yes, sir.

Q. Yes.

Mr. Deasy; I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Mr. Wibye, now these two transfusions that were set forth on that bill are bills that you paid for your brother Niels? [42] A. Yes, sir.

Q. In other words, that you advanced for him?

A. Yes.

(Testimony of Harold E. Wibye.)

Q. Now you have the items on there that Mr. Deasy called your attention to, Dr. High, and which you say there were loose fillings which were replaced? A. Yes, sir.

Q. Do you know whether or not those fillings were knocked loose in this accident?

A. I am positive of it, because I could stick my tongue in and feel the movement.

The Court: What he means—what the attorney means is, before the accident, were they loose?

A. I have no recollection of it; no.

Q. You first noticed them loose after the accident?

A. I first noticed them loose after the accident.

Mr. Richard: Immediately after the accident. Allright, I have no further questions.

The Court: We will take a brief recess.

(A brief recess was taken.)

Mr. Richard: Mr. Nelson, will you come forward, please? [43]

NELS K. WIBYE

Called by the plaintiff, sworn.

The Clerk: Please take the witness chair.

Q. Will you state your name to the Court?

A. My name is (spelling) N-e-l-s K. Wibye.

(Testimony of Nels K. Wibye.)

Direct Examination

By Mr. Richard:

Q. Are you one of the plaintiffs in this action in one of the cases? A. Yes, sir.

Q. Where do you live, sir?

A. My home at the present is at 264 East 4th Street, Winona, Minnesota. I am living with my parents.

Q. Are you married or single?

A. No, I am single.

Q. And your age, please?

A. I am 44 years of age.

Q. Now, you were riding in the automobile driven by your brother that we are discussing here today? A. Yes, sir.

Q. And he testified that that automobile belonged to you? A. It did, sir.

Q. Is that correct? A. Yes, sir.

Q. You were riding in the front seat with him at the time of the happening of this accident? [44]

A. Yes, sir; I was riding in the right-hand portion of the seat.

Q. Was there any reason why your brother Harold was operating your automobile rather than yourself at the time of this accident?

A. No reason whatsoever. If we are making a trip, we will alternate; first he may drive first and we alternate every seventy-five to a hundred miles.

Q. And he had started out in the driver's seat that afternoon?

(Testimony of Nels K. Wibye.)

A. Yes, sir; he had started in the driver's seat.

Q. All right. Did you and he get into the car from this same location in the vicinity of 151st Avenue in San Leandro?

A. I believe the work that we were on was at Plaza Drive which corresponds or is the next immediate street to 157.

Q. But were you working upon the same construction job? A. Yes, sir.

Q. And you were driving upon the highway that he mentioned, generally in an easterly direction, and your destination was Bakersfield?

A. That's right; yes, sir.

Q. Do you remember what, if anything, you were doing, since you weren't driving, shortly before the happening of the accident? A. Yes, sir; I do.

Q. And what? [45]

A. I have a habit of collecting news items out of the paper, current events and articles of interest, and I just tear them out and put them in my pocket and read them in my leisure time, and when we start out from the job site, I pull those clippings from my pocket and proceed to read the articles that I am interested in.

Q. Were you engaged in that at the time this accident happened?

A. Well, sir, I do not know; but I presume that I was.

Q. Do you have any recollection of the happening of the accident?

(Testimony of Nels K. Wibye.)

A. I have no recollection whatsoever of the accident.

Q. You do not, then, recollect having seen this olive-drab car approaching you? A. No, sir.

Q. And your first recollection of events after the happening of the accident—you were located where?

A. We were in a stationary position on the roadway.

Q. I see.

A. We were motionless in the car on the roadway, and I have a recollection of someone at the car door. That is the only recollection that I have of the accident.

The Court: You mean after the accident?

A. That is—yes, immediately after I came out of a period of unconsciousness. [46]

Q. However, you were still at the scene of the accident? A. Yes, sir.

Q. Now, did your recollection then continue, or did you lapse off into unconsciousness again? What I want to find out is whether or not your recollection from that time on was good or bad or whether it was just a fleeting recollection.

A. No, sir; it's impossible for me to give you a continuity of events. I can say this: That I have an awareness of someone being at the car door, and I believe that they tried to remove me from the car, and that was all that I remember at that time until we were traveling in the ambulance, supposedly, to the hospital. Of course, I didn't have any realiza-

(Testimony of Nels K. Wibye.)

tion, but I knew that I was in an ambulance because that siren was wailing and I was aware of that.

Q. All right. Now, you eventually landed in Providence Hospital, the same hospital as your brother?

A. That was the final destination, Providence Hospital; yes, sir.

Q. But in the meantime, you were taken to an emergency hospital, the Fairmont Hospital, were you not, of the County Hospitals in Alameda County, I believe? A. That is correct.

Q. Now, do you have a recollection of being in that first hospital at all?

A. Yes, sir; I do have a recollection of being in the first [47] hospital, although I did not know where I was.

Q. Do you have any recollection of anything that was done for you at that first hospital?

A. Yes, sir. I have a vague sense of the fact that I was administered blood plasma. I do not know if they did anything further to aid me.

Q. Now, do you recall the trip from that hospital, Fairmont Hospital into Providence Hospital in Oakland, in an ambulance?

A. Yes, sir; I do remember riding in the ambulance. I do not know if I remember the entire progress of the trip or not, but I know that I was aware of being in an ambulance.

Q. Would you tell me, Mr. Wibye, when, if you can, with respect to the 8th day of November, the

(Testimony of Nels K. Wibye.)

date of the accident, there came a time when you had a pretty clear recollection of events from then on?

A. After the accident on the 8th day of November, I have no clear recollection of events whatsoever.

The Court: No, he means what is the first time that you really came to yourself and from there on were you able to recall.

The Witness: Well, sir, that was in Providence Hospital, I presume, that my really first conscious memory is; at that time that I was coming out of the anesthetic after the first day surgery.

Q. (By Mr. Richard): Do you know whether that was on the [48] night of the accident, upon the day following, or two days following?

A. Well, I do not know, because I have no recollection of the passage of time.

Q. All right. So that you have no recollection of having gone into surgery for the first time at all?

A. I have no recollection of being in surgery whatsoever for the first time that we were there.

Q. You do not, of your own knowledge, know what was done? A. No, sir; I do not.

Q. When you finally came to—after you say you came out of the anesthetic in the Providence Hospital——

A. The Providence Hospital.

Q. (Continuing): ——were you in bed?

A. I was in bed; yes, sir.

Q. And did you have any appliances, casts, or

(Testimony of Nels K. Wibye.)

bandages, or anything like that? A. Yes, sir.

Q. To any parts of your body?

A. I did, sir.

Q. What sir?

A. Well, my first recollection is that I was in bed and my both arms were suspended in the air, my right arm, probably from here over the wrist.

Q. Now, you are indicating about midway between the wrist and [49] the elbow?

A. Yes, perhaps midway or three-quarters of the way of the distance to the elbow; from that portion down to my knuckles. My arm was in a plaster cast and hanging up in the air in this position. (Indicating.)

Q. What about your left arm?

A. My left arm was bandaged, I believe, in what they call a semi-rigid bandage which bears a similarity to a cast; and it also was suspended in the air. My right knee was——

Q. Now you are indicating your left knee there.

A. Excuse me. My left knee was off the bed in this position here (indicating). It was suspended in a sling, and this—the rope on this sling went through a pulley and down to weights, which were combined with weights attached to my foot. In other words, my left leg was in traction. My left leg was badaged from my knee down around my foot. I do not know the technical name of the type of bandage they apply in that particular case.

My right leg was in a plaster cast from my hip down to my foot. It was also in traction. I did not

(Testimony of Nels K. Wibye.)

know at the time, but I learned later that they had inserted a wire rod through my heel in order to attach the weights, that I might lie in traction.

Then I had—I couldn't—I guess perhaps that I tried to speak. That's the probable normal thing to do, and I discovered [50] that I couldn't speak in any manner that was really understandable, I don't suppose; and I discovered that one of my front teeth was missing. Then, too, my teeth on my upper jaw were loose and I could move them around with my tongue; and I also recall bleeding from the mouth and also from various cuts that I had about my face; and I think I had some cuts on my head that were really not severe enough or bad enough to require suturing; and perhaps when I moved my head, why, I knocked off scabs or something—I don't know—and my stomach was distended and it looked like probably half a bushel basket under the sheet, and I was in *every* severe pain. I was in agonizing pain from my head to my feet. There was no outstanding pain; I couldn't localize my pain. And at that time, of course, I didn't have—I couldn't rationalize anyway—so it didn't make much difference to me—even the thought of it.

Q. Now, I understand, at that time, that you had been in surgery?

A. Yes, sir; that's after I returned from—well, we might say the first aid surgery. That is, when we were brought to the hospital, we were taken to the Fairmont and transferred from the Fairmont to Providence. After we arrived there, we were

(Testimony of Nels K. Wibye.)

taken into surgery for preliminary check-up and treatment.

Q. Now, in your own words, will you just detail to his Honor and count the injuries that you received in this accident—in [51] your own words as best you know, and the complaints that you had?

A. Well, sir, starting with my head, as I say, the first awareness in relation to it is the fact that my upper teeth were all loose and one was missing in the front. This being the case, it wasn't possible for me to bite or chew food, and my food was given to me in small pieces I could just probably take with my molars and chew a little bit and then swallow; but I was unable, as I say—as I say, I was suspended and I was unable to take care of feeding myself or taking water or anything. Well, it was impossible to do anything with regard to the teeth at that time. In fact, I wasn't even thinking about that; and I did know—I knew that I had cuts on my face. I knew my face was swollen; I knew that I had cuts there. And then I soon learned that I had a cut across my chin which shows approximately two inches at this time, which was sutured by the doctors in surgery the first time that they worked on us.

When I came to or came to consciousness in the hospital, the only movement that I was capable of turning was the turning of my head to the right and to the left—and I have to stop a minute and think where I am going.

(Testimony of Nels K. Wibye.)

I have mentioned the cut here (indicating). I have mentioned my teeth.

Q. Did you have cuts above the right arm? [52]

A. Yes; but I haven't quite completed with my head as yet, sir.

Q. All right.

A. I was in pain, as I say, from head to foot.

The Court: You already said you had some cuts in your head and a cut on your forehead and a cut on your chin.

The Witness: That is correct. Since that time, I have a mild sensation of a mild electrical shock, or it's undulating, a fluttering feeling on the right side of my head which occurs once or twice a day.

Q. (By Mr. Richard): Now you indicated the left side of the head.

A. Yes, on the left side of the head. It's on the left side of my head; and I have a sound in my ear, the sound of air escaping through the valve of an automobile tire. That takes care of my head; and I have a free motion of my head.

My eyesight, my situation is normal, although I might say this: For a period of several weeks, I was unable to read newspapers; the print was just merely a blur. Dr. Norcross was called in to check me on that and he said it was concussion and shock and I would come out of that.

I have on my right arm—it was lacerated from here down to this point and from this point across to here. (Indicating.) This portion is the one which

(Testimony of Nels K. Wibye.)

was under the cast and was sutured, and I was later told that Dr. Fisher had had to tie the cords into these three fingers. I think about—oh, it [53] was several weeks later when the cast was removed, my hand and my wrist was rigid, so the doctor started me on physiotherapy. I started to bend the fingers—with adhesions in here that would not allow my wrist to bend. I do not have the full motion of my wrist now; and gradually, through constant exercise, I have brought my right hand so that I have full motion of my fingers.

The Court: You have a limited motion?

A. Yes, in the wrist; but it's not a fluid motion; it's a conscious——

Q. (By Mr. Richard): What about your grip, Mr. Wibye?

A. My grip has developed so that I have a fair grip in my right hand.

Q. Now, the scar on the right form is is approximately six or eight inches?

A. No, I would say it's over five inches. There is five inches that is in evidence there.

The Court: Has the fracture in your hand healed?

A. Well, I don't know, sir.

Q. I mean was there a fracture in your hand above the wrist?

A. No, sir; I think it was caused because the cords were tied in here.

Mr. Richard: I believe there was no fracture involved in the right wrist.

(Testimony of Nels K. Wibye.)

Q. Now your left arm? [54]

A. May I complete with my left hand, sir?

Q. Yes; go ahead.

A. I have in this area through here (indicating) —I do not have a normal feeling in the hand. It's not a healthy, normal feeling. It's sort of a numbness, but at the same time, it's very sensitive and if I happen to touch something like this, unconsciously I have a violent reflex action here, and this arm in this area here will become numb and go to sleep probably once a day or twice a day and may skip a day or two. That completes my right arm.

Q. Now your left arm?

A. Now my left arm, starting from my thumb. I have here a scar approximately an inch and a half which was sutured, and I believe the cords were tied in here; and this hand was also rigid and had very little motion in my thumb and fore finger; and that too was brought out to start out by physiotherapy. I would just have—perhaps I can show you—(witness removes coat)—I have here a scar that was sutured, which is approximately an inch and a half long, perhaps a little more. I do not know if there is any particular damage in there or not.

I have, across the back of my arm, this area here, approximately four and a half inches long. Then, I have a scar under here. It's jaggered.

The Court: In your arm pit? [55]

Mr. Richard: Left arm pit.

The Witness: In the left arm pit; yes, sir. This, of course, is severely painful to start with.

(Testimony of Nels K. Wibye.)

The Court: Any fractures in that arm?

A. No, sir; no fractures.

Q. This is a somewhat same type of injury as the left arm, as far as the cords and nerves are concerned?

A. I believe, sir—I was told that these cords here are tied; and I think there is some tying in here and in here; but that is what I have been told.

Q. Have you got a grip on that right hand?

A. I have a fair grip and full motion of my fingers.

Q. Any wrist motion?

A. Excuse me. I have fluid motion of my left wrist.

Mr. Richard: All right. Will you put your shirt on?

A. Yes, sir.

The Court: How much do you weigh now?

A. I weigh between 185 and 190 which is my normal weight.

Q. I suppose you lost weight after the accident, and then regained it?

A. Yes, sir. I presume that when I entered the hospital, I weighed—oh, between 185 and 190 pounds; and when I got so that I could move about on my crutches; I went down to the scale room and weighed myself, in probably the middle of February or the latter part of February, and I weighed 130 pounds. [56]

Q. Now you weigh about 185?

(Testimony of Nels K. Wibye.)

A. I weigh between 185 and 190; yes, sir.

Q. (By Mr. Richard): Now, Mr. Wibye, let's go down to your lower extremities.

A. Well——

Q. Get your shirt buttoned.

A. Excuse me.

The Court: That's all right. He can do that after recess.

The Witness: The first surgery that was performed on me after we were duly admitted and thoroughly examined and taken care of in the hospital was on my left buttocks. I did not know what was wrong or what the doctor was going to do. I knew there was something wrong that had to be repaired; and I have an incision across my left—across the left buttocks here in this manner, something like that it's sutured for—oh, probably eight inches or more; and on this surgery, Dr. Fisher inserted two screws to replace the socket on the femur. The socket of the femur was broken off and the two screws were placed there to bring it back.

The Court: There was a fracture there?

Mr. Richard: There was a fracture of the left acetabulum.

The Witness: And then after the first surgery, I had transfusion. After I had built up a little bit, they operated on my right knee, and I have an incision there that [57] is several inches long; and there was a fracture in here that went into the knee joint and the doctor put in three or four screws in there to weld the bone back together.

(Testimony of Nels K. Wibye.)

The Court: Have you motion of the knee now?

A. I have restricted motion of the knee. I can not—for instance, I can bring my left up in this manner; and that's the limit of my right. (Indicating.)

Q. Yes.

Q. (By Mr. Richard): Now was that surgery performed at the same time as on the left hip, or was that later?

A. The surgery was performed——

The Court: He is referring to his right leg there.

The Witness: The surgery on my right leg was performed two weeks, perhaps more or less, after the surgery on my left buttocks.

Q. (By Mr. Richard): All right. Now, there was also surgery performed on the right hip, was there not?

A. At that time, there was no surgery performed on my right hip. I laid in traction for a period of approximately eleven or twelve weeks. I knew that there was something wrong in here, but due to my condition, it was impossible to do anything for me.

Q. And then after some eleven or twelve weeks, was surgery performed on the right hip?

A. No, sir; there was no surgery performed on my right hip [58] until the 11th day of June in 1947.

Q. And then what was done, generally?

A. On the 11th day of June, I entered surgery,

(Testimony of Nels K. Wibye.)

and Dr. Fisher rebroke my hip and inserted a pin into the bone, a pin and plate affair that is screwed onto the bone, adjoining my legs together again.

Q. There had been a fracture in the right hip originally? A. Yes, sir.

Q. And then it was broken and an open reduction was made with surgery? A. Yes, sir.

Q. Was general anesthetics administered on these operations that you have told us about?

A. I believe that I had a spinal on the two operations, that is, on my right knee, my right hip; and on my left hip, I had ether, I believe.

Q. Now, you entered the hospital on the 8th of November, 1946. How long did you remain there continuously until you left the hospital the first time?

A. I left the hospital on the 4th day of March in 1947.

Q. And during that period of time, you were constantly in the Providence Hospital?

A. I was constantly in Providence Hospital.

Q. And you were attended generally by Dr. Fisher? A. Dr. Fisher was my—— [59]

The Court: Is Dr. Fisher going to be a witness?

Mr. Richard: Yes, your Honor.

Q. Were other doctors called in consultation? You have mentioned Dr. Norcross.

A. Well, Dr. Norcross was called in, and Dr. Libby, I believe, was.

(Testimony of Nels K. Wibye.)

The Court: I think you might make it easier if you leave that to the doctor to testify to.

Mr. Richard: All right. You mean the specific things?

The Court: Yes.

Mr. Richard: All right.

The Court: After all, those are not controversial matters as to whether another doctor was called in, and it's better to have the doctor testify. We would get a little more accurate information that way.

Q. (By Mr. Richard): All right. Then, when you left the hospital, where did you go?

A. I went to the Harrison Hotel.

Q. Were you readmitted to the hospital again?

A. I was readmitted to the hospital on the 10th day of June, 1947.

Q. How long did you remain at that time, approximately? A. I remained ten days.

Q. And during that time, the operation was performed, as I understand it, on the right hip? [60]

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Now what was your condition between leaving the hospital in March and your re-entry in June, as far as being ambulatory?

A. Well, sir, when I left the hospital in March, I left as soon as I could possibly get out of there. I was able to move about on crutches for a distance of approximately one hundred yards, with great difficulty. I had no—my right—after the cast was removed, my ankle was rigid and my knee was

(Testimony of Nels K. Wibye.)

rigid and my hip was stiff, and so it was very difficult to get about. I walked around with crutches in that manner, (indicating)—on two crutches for a period of time, and gradually I came to a point where I could get around with a crutch and a cane; and just prior to the time I entered the hospital, I got so that I could get about for a distance of fifty or sixty yards on a cane alone, but it was impossible for me to walk anywhere in a normal fashion, because of the fact that my hip wouldn't function; and my leg was apparently a great deal shorter than my left.

Q. Now, as I understand it, when you entered the hospital for the second time, you had no casts upon the leg?

A. I had no cast upon me; no, sir.

Q. Now, you were in the hospital approximately ten days the second time? [61]

A. Yes, sir.

Q. And did Dr. Fisher perform the surgery?

A. Dr. Fisher performed the surgery.

Q. At that time?

A. Yes, sir.

Q. When you left the hospital after being in there in June, was the right leg in a cast?

A. The right leg was not casted.

Q. So that when you left the hospital the second time, you were without casts?

A. I was without casts.

Q. How did you get about after leaving the second time?

A. Well, sir, I got about after leaving the second

(Testimony of Nels K. Wibye.)

time much in the same manner as leaving the first time. I required the support of two crutches to move about, and I had to go through the same process of relearning to walk as I did in the first instance.

Q. Now, have you detailed, generally speaking, the injuries that you received in this accident, Mr. Wibye? A. Yes, sir; I did.

Q. In your own language——

A. Yes, sir; I have covered everything insofar as I am aware.

Q. Now, you incurred certain obligations.

The Court: Have you got a list of those like you had in [62] the other case?

Mr. Richard: Yes; I am looking for it right now. Unfortunately, your Honor, I didn't have this typed up. Might I read these items?

The Court: All right.

Q. (By Mr. Richard): I will ask you if these items were furnished by you to me (reading): "Dr. Fisher—Dr. Lloyd Fisher, for services, \$1146.25"?

A. Yes, sir.

Q. "Providence Hospital, \$1716.59."

A. Yes, sir.

Q. "Special nurses, \$900"? A. Yes, sir.

Q. And the special nurses were all of Providence Hospital, were they not? A. Yes, sir.

Q. "X-rays, \$235." A. Yes, sir.

Q. "Dr. Libby, \$50"? A. Yes, sir.

(Testimony of Nels K. Wibye.)

Q. "Dr. Norcross, \$20"? A. Yes, sir.

Q. "Dr. Kracaw, \$25.00"? A. Yes, sir.

Q. "Ambulance hire, \$3.75"? [63]

Q. "Crutches, \$5.15"? A. Yes, sir.

Q. "Cane, \$3.00"? A. Yes, sir.

Q. "Vibrator, \$23.64"? A. Yes, sir.

Q. Was that prescribed by the doctor?

A. It was not prescribed by the doctor, but I knew that massage and exercise was in order to facilitate that work and I procured the vibrator.

Q. And you have a pharmacy bill here of \$6.19.

A. Yes, sir.

Q. And if my addition is correct, those totals are \$4,134.56.

Mr. Richard: We offer that list in evidence, if your Honor please; and I might state that, except for a very few incidental items, those are supported by cancelled checks which we have right here.

The Clerk: Exhibit two.

(List of medical expenses, Nels Wibye, was then admitted in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: Well, perhaps we might take a noon recess now and we will reconvene at 2:00 o'clock.

Mr. Richard: I am sorry I didn't notice it was 12:00.

(Court was then adjourned, to reconvene at 2:00 o'clock, p.m.) [64]

(Testimony of Nels K. Wibye.)

Afternoon Session—July 28, 1950

(Nels K. Wibye, being previously duly sworn, resumed the witness stand and testified as follows:)

Further Direct Examination

By Mr. Richard:

Q. Mr. Wibye, in connection with the expenses incurred by you shown on the sheet that was introduced in evidence, there is not included an item of transfusions of \$50 which apparently was on your brother's sheet.

A. Well, sir, I believe that you will find in the bills that I have received from the hospital, that I have paid to the hospital a processing charge in connection with these transfusions for the processing of blood. That's the only——

Q. But you did not pay for the blood that was actually used?

A. No, sir; I did not actually pay for the blood; I merely paid for the processing, for the laboratory work.

Q. And this \$50 represents a charge for the blood plasma?

A. Yes, sir. I did not pay any——

Q. But your brother did? A. Yes.

Q. All right. Now what was your business or occupation at the time of the happening of this accident, sir?

(Testimony of Nels K. Wibye.)

A. Well, at the time of the accident, I was working as carpenter foreman on a small project.

Q. Was that the same project upon which your brother Harold was working?

A. Yes, that is correct.

Q. And you were a carpenter foreman?

A. I was working as a carpenter foreman at that time; yes, sir.

Q. That is what I mean; right then.

A. Yes, sir.

Q. And you had worked the day of the accident, as I understand?

A. Yes, sir.

Q. What wage or remuneration were you receiving at that time for your services?

A. I was receiving \$100 a week for a 40-hour a week—on a basis of 40 hours; yes, sir.

Q. That was base pay for a carpenter foreman?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. Now for how long prior to this accident had you been engaged in the carpentering or construction business?

A. Well, I have worked at construction off and on during my entire life when I haven't been going to school; but I became actively engaged—that is, I put my whole time in on construction work since the year of 1931 or '32. It is [66] in the early thirties that I set out to work at construction as a business.

Q. Let's take for the period of six or eight years

(Testimony of Nels K. Wibye.)

—say eight years before the happening of this accident, which takes us back to somewhere around 1938. Had you been working regularly at your trade as such?

A. Well, we came—my brother and I came to Oakland and we went to this small job. We knew it was just of short duration but we came here primarily in search of work, but as a carry-over, and we took this small job and——

Q. Well now——

A. (Continuing): ——and previous to coming up here, I was working for O. D. Williams at Bakersfield. I only worked for Mr. Williams for several weeks. We didn't see eye to eye, so we just parted.

Q. What kind of work were you doing upon that job?

A. I was engaged by Mr. Williams to work as a general superintendent in charge of three telephone buildings that he had under construction; but, as I say, we couldn't get along; we didn't get together.

Q. You worked several weeks upon that project?

A. Yes.

Q. What did you receive there?

A. I don't recall definitely. It was either \$135 or \$150 a week. I haven't a clear recollection of it.

Q. Did you engage in construction work either supervising or as foreman or things of that kind during the war?

A. Well, sir, yes, I will go back; I will travel backwards. Yes, during the war.

(Testimony of Nels K. Wibye.)

Q. That is during the time that the United States was engaged in the war between 1941 and 1945?

A. In 1945, I went to work for the engineers of the Naval Ordnance, Inyokern, California. I was employed by them as a general carpenter foreman; and then I was given the superintendency of the Channel Lake area.

Q. And what was that? What kind of work were you doing?

A. That's a job that I had the direction and the coordination and supervision of the various crafts engaged in the construction of the various buildings they were putting up at that time.

Q. What did you receive there in the way of wages?

A. My weekly wage there was \$135 as Area Superintendent. Toward the middle of the summer, I went to work as a mechanical superintendent for the same company. I went from general foreman to Area Superintendent; and then went into the mechanical, and I had charge of the installation of machinery and equipment of the California Institute of Technology. In this capacity, I had an organization of my own and I was responsible only to the C.I.T.

Q. That is California Institute? [68]

A. Yes, sir. And I had first call on the facilities and manpower of the Hattock Engineers and the various subcontractors.

Q. What did you receive in that work?

(Testimony of Nels K. Wibye.)

A. Well, I received—my pay remained the same, \$135 a week, but if I had went in the office I would have gotten \$150.

The Court: During the five years prior to this accident, how much of that time would you say you were actually employed?

A. Five years prior to the accident?

Q. During the five years.

A. During the five years, I was employed one year there.

Q. No, no, I don't want you to go into detail. I want you just to tell me whether you were employed all the time or seventy-five per cent of the time or fifty per cent of the time, to the best of your judgment.

A. I will say this: I did work in 1941 and '42 practically the entire period.

Q. Were you sick in '43?

A. Yes, I was ill in 1943 and 1944; yes, sir.

Q. What was the trouble?

A. Well, sir, the Austin Engineering Company sent me from Freeport, Texas, to Port Huron, Michigan, to construct some power buildings. When I was there, I came down with chills [69] and fever, and unfortunately, instead of getting an M.D., I got a man——

Q. What did you have, malaria?

A. I don't know. Instead of getting an M.D., I got a man with a D.O. degree and I did not know that he could not get me entrance to a hospital;

(Testimony of Nels K. Wibye.)

and he filled me full of sulfa drug which was a miracle drug at that time, and he knocked me out.

Q. It was from that time of illness that you were laid up? A. Yes, sir.

Q. Now that brings you up—now you say you worked in 1945? A. Yes, sir.

Q. Now during 1945 and in 1946, up to the time of this accident which was in November, that's about 23 months, how much of that time; what percentage of that time were you actually working?

A. I worked 95 per cent of the time in the year 1945 and the year 1946, I earned probably—oh, \$1800 to \$2000. I wasn't unemployed during the year totally during '46, because of the fact that I was job weary when I came off in January and I went home for a period of several weeks, and then I went out and tried to establish or line up a business that I could engage in myself. [70]

The Court: Go ahead.

Q. (By Mr. Richard): Have you done any work since the happening of this accident in November, 1946, Mr. Wibye?

A. I have done no work since that time.

Q. Have you tried to do any work?

A. Well, I have done small jobs, odd jobs around the house. I have done a little electrical repair work and changing of electrical receptacles, and that is wall plugs and wall switches, and helped my father. I attempted to help him at papering.

Q. That is in your own home back in Minnesota?

A. Oh, yes; that's merely work at home.

(Testimony of Nels K. Wibye.)

Q. But you have not worked for hire?

A. No, I have not worked for wages.

Q. Having in mind your activities generally, what were you required to do upon these various jobs? What is it now that prevents you from engaging in your usual occupation?

A. Well, I have limited motion in my leg. In my right leg, the muscular strength has not returned to normal. I haven't developed, or recuperated slowly. The change has been practically, you might say, imperceptible.

Q. Does your right knee, your right leg, pain you upon use?

A. Yes, I have pain below my right knee in this region here (indicating). When I am idle and not doing anything, [71] the pain subsides and I can walk a ways without any sensation of pain; but as fatigue sets in, why, the pain sets in in my knee and likewise sets in in my hip.

Q. You are indicating your right hip.

A. In my right hip, yes; in my right hip, I have a pain that starts to the left of my coccyx and extends in around the hip, in the hip in here, and up into my back in here; and, as I say, as fatigue sets in, the pain starts up and increases in intensity, and I will come to a point where I just can't go any more and I have to go down. If I don't sit down and relax, why, it will pull me down.

The Court: I noticed that when you walked up to the witness chair, you walked rather slowly. Why do you do that?

(Testimony of Nels K. Wibye.)

A. Because I cannot move my right leg normally. I have a discord action on my left leg. So far as I know, it is probably restricted, but maybe it is less than one per cent, probably; but my right leg, I cannot move this, my right knee.

Q. That is because of the stiffness, is it?

A. Well, this—yes, this knee is more or less rigid. It seems as though there is a ridge; this bone is broken up into the knee. There is a ridge in there and it is sort of compacted there that doesn't give me free action on the knee. [72]

Q. (By Mr. Richard): Mr. Wibye, on movement of the knee, you indicated to me yesterday, you can hear a grinding sound.

A. Yes, it cracks when I——(indicating)

The Court: Yes, I can hear it from here slightly.

Q. (By Mr. Richard): Well, having in mind, Mr. Wibye, the work generally that you have been engaged in for the last sixteen or eighteen years, is it necessary for you to climb upon scaffolding and be in and about buildings and on ladders and structures?

A. Yes, sir. I may be in excavation one minute, and five minutes later I may be 100 or 150 feet in the air. It is necessary to climb up and down ladders.

The Court: It isn't necessary to go into that. The Court can take judicial notice of the nature of the occupation of carpenter and construction.

Mr. Richard: Certainly.

(Testimony of Nels K. Wibye.)

Q. Do you feel that you are able to do that work at the present time? A. No, sir, I do not.

Q. Have you been at any time since the happening of this accident? A. I have not.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Now, Mr. Wibye, you have been billed by the hospital [73] and the doctors in connection with these expenditures which are listed on this list; is that right? A. Yes, sir.

Q. And you made this list up, I understand, for Mr. Richard from the bills that you received?

A. From the bills, sir, and the cancelled checks in payment of those bills.

Mr. Richard: Here are the cancelled checks, and I believe each one is separate, doctors and hospitals and special nurses, and everything except for a very few, there are cancelled checks for every item.

Q. (By Mr. Deasy): Dr. Fisher's bill was \$1146.25, is that right?

A. That is to that particular time; yes, sir. I have seen Dr. Fisher since that statement.

Q. You mean that there will be an additional bill from Dr. Fisher for your treatment?

A. Yes, sir; I have gone to see Dr. Fisher periodically, and there is outstanding the bills for some cause.

Mr. Richard: Dr. Fisher's bill in April \$1146.25?

(Testimony of Nels K. Wibye.)

Mr. Deasy: Yes.

Q. And then the hospital bills. How long did you say you were in the hospital? From November until March, is that right?

A. Yes, sir; November until March. [74]

Q. Of 1947?

A. Ten or eleven days; I am not sure which it would be; I think it's either ten or eleven.

Q. And their total bill for treatment to you and for the use of the hospital facilities during that period of time amounted to \$1716.59, is that right?

A. I believe so.

Q. Is there any outstanding bill from the hospital in addition to that?

A. There are no outstanding bills in connection with the hospital whatsoever, nor any other bills excepting Dr. Fisher.

Q. And the total nurses bills were \$900?

A. Yes, sir.

Q. Now, this item you have, \$235 for X-rays. That includes, does it, all the X-rays which were taken at any time during the time you were under treatment by the doctors or in the hospital?

A. That is up to the time that that list was submitted; yes, sir. There were other X-rays since.

Q. Those were taken at the direction of Dr. Fisher when you recently saw him; is that right?

A. They were taken at the direction of Dr. Fisher.

Q. What was Dr. Libby's bill for what treat-

(Testimony of Nels K. Wibye.)

ment? What treatment did he provide you with, Mr. Wibye? [75]

A. I cannot definitely say. Dr. Libby works in conjunction with Dr. Fisher.

Q. What particular items of services was the bill for? Did he treat you during the time that you were first unconscious in the hospital?

A. Excuse me; I believe that Dr. Libby assisted on surgery perhaps with Dr. Fisher.

Q. What was Dr. Norcross' bill for?

A. Dr. Norcross was sent in to examine me by Dr. Fisher, as he is primarily—his profession is brain specialist, and he examined me in connection with this shock, concussion.

Q. There is another doctor here, Dr.—

A. Peacock, sir. He is a house physician, or was at that time, the house physician at Providence Hospital; and I think that perhaps he assisted Dr. Fisher; I cannot rightly say.

Q. And the bill you have for pharmacy, that is for medicines which you purchased after leaving the hospital, is that right?

A. No, sir. That was, if I recall correctly, that is for medication received and purchased at the hospital dispensary during the time I was at the hospital. Yes, I am positive of that fact.

Q. That wasn't included in the hospital bill, is that right?

A. No, sir; the pharmacy bill is a separate item. However, [76] it may be a prescription—part of it

(Testimony of Nels K. Wibye.)

may have been a prescription. It was filled at the pharmacy after the time I left the hospital, at the direction of Dr. Fisher.

Q. Now this vibrator which you purchased was for the purpose of limbering up the stiffness in the muscles?

A. Yes, sir. Excuse me, it is for the purpose of massaging my arm and wrist and hands and thumb, and to induce circulation in my leg and bring back the muscular development.

Q. I think you stated that you only worked a portion of the year during 1946; is that right?

A. That is correct, sir.

Q. What is the reason for that? That you were laid off between jobs, is that what it was?

A. No, sir. I completed my work the first of the year in 1946 and could have remained at work at the base, but it was my desire to go home for a period of time, and it was also my desire to get out and look around and see if I could establish or get into some kind of business where I could earn my own livelihood, rather than working for someone else.

Q. In other words, you finished work at this Naval base, whatever it was down there. What did you say the name of that base was?

A. Naval Ordnance Station 160.

Q. At Inyokern?

A. Inyokern, California.

Q. And when you finished the work there, you took time out [77] to take a little rest and look

(Testimony of Nels K. Wibye.)

around, is that right? A. That is correct.

Q. With the idea of getting into something a little more permanent?

A. That's right—not more permanent, it was——

Q. Well, I mean something that was some civilian work?

A. I wanted something where I didn't have to go to work with the whistle and stop with the whistle.

Mr. Deasy: I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Mr. Wibye, on this list that contains all these cancelled checks, I find this statement that I believe I overlooked: "Dated March 30, 1948," a Dr. Hargett at St. Charles, Minnesota, a dentist, for dental services. A. That is correct.

Q. In the amount of \$262, marked "Full upper denture, full mouth X-ray, extract all upper teeth."

A. That is correct.

Q. Were those services performed there the result of the injuries you received as a result of the accident? This morning, you detailed about some of your teeth, one tooth being out, other teeth being loose. A. Definitely.

Q. And as a result of that, these services were performed? A. Definitely. [78]

Q. And this bill was presented, and I see it is marked paid. A. Yes, sir; I paid it.

(Testimony of Nels K. Wibye.)

Mr. Richard: We offer that in evidence, if your Honor please.

The Clerk: Exhibit 3.

(Invoice for dental work, N. K. Wibye, was then received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Richard: I believe that is all, your Honor.

(Witness excused.)

ERNEST H. SCHOENING

called by the plaintiff; sworn.

Direct Examination

By Mr. Richard:

Q. Your name is Ernest H. Schoening?

A. Schoening (spelling), S-c-h-o-e-n-i-n-g; that's right.

Q. You reside where?

A. Menlo Park, California.

Q. And your business or occupation?

A. Traffic Officer of the California Highway Patrol.

Q. And you have been connected with that department for approximately how many years?

A. Since 1934.

Q. I will ask you, sir, whether or not on the 8th day of November, 1946, you were a member of the Highway Patrol working in the County of Alameda?

(Testimony of Ernest H. Schoening.)

A. I was. [79]

Q. What office were you working out of at that time? A. The Hayward Office.

Q. Do you know whether or not on the afternoon of that date you were called to generally the east side of Pergola Hill on Dublin Highway in response to a claim that there had been an accident?

A. I was.

Q. Do you recall where you were, Officer, when you received the call?

A. Yes, I was approximately about a mile and a half west of Dublin on what we call the Mooma Hill.

Q. And that is approximately how far from the place of the accident?

A. I would say it would be approximately four and a half to five miles.

Q. All right, Officer, upon receiving that call, you proceeded, did you, and found that there had been an accident? A. I did.

Q. Was that in the vicinity of Pergola Hill?

A. It was on the east end of Pergola Hill.

Q. When you arrived, what did you find, sir?

A. On arriving at the destination, I found two cars on the south portion or the south shoulder, approximately a short distance above what we term the Old Dublin Road. The traffic was quite congested, and upon arrival at the automobiles, I found the driver of the one car embedded in the debris, and the other two occupants had been taken by the ambulance to the hospital.

(Testimony of Ernest H. Schoening.)

Q. Now the occupant that you say was embedded in the debris was in which automobile?

A. He was in the government car, the Plymouth sedan, later found out to be John Elliott Hadley.

Q. Officer, you have a couple of photographs there, I believe? A. I have.

Q. I will ask you if in this first photograph you can see a tow car in the vicinity and to the right of the tow car you see two automobiles?

A. I do.

Q. Are those the two automobiles that you found upon arrival at the scene of that accident?

A. They are.

Q. Does that photograph fairly portray the location of those two automobiles when you arrived?

A. They do.

Mr. Richard: There are a number of them. Shall we offer them singly or in a group, Judge?

The Court: Whichever way you wish.

Mr. Richard: Well, here's another one. I am sorry you haven't seen that.

Mr. Deasy: No. [81]

Mr. Richard: We offer that; and in conjunction therewith—now you have seen these?

Mr. Deasy: Yes.

Q. (By Mr. Richard): This apparently is a view closer up of the two automobiles.

A. That's right.

Q. Is that correct? A. That's right.

Q. Does that likewise portray a true situation at

(Testimony of Ernest H. Schoening.)

the time you arrived, as far as the two vehicles are concerned? A. Yes, it does.

Mr. Richard: We offer those, your Honor. We suggest they be marked together, showing the two vehicles together.

The Clerk: Exhibit 4.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. Richard): Do you have the license number that was taken down by you upon the government car?

A. Yes, I have. It is 1942 Plymouth Sedan, USA 142857, and it has the following on there, Capital SEGD dash ADM 12.

Q. I show you here the photograph of an automobile, and upon the hood, the numbers 142857, showing the left side, and ask you if that portrays the left side of the government automobile as it existed immediately after the happening of the accident? [82] A. Yes, it does.

Q. Now, I show you another photograph.

The Court: Do you want that marked?

Mr. Richard: I would suggest that I have another one showing the other side that might go in together.

The Court: All right.

Q. (By Mr. Richard): Another showing 152857, showing the front and right side. Is that the same automobile? A. It is.

(Testimony of Ernest H. Schoening.)

Q. And is that the condition in which it existed upon your arrival? A. It was.

Mr. Richard: If your Honor please, we offer those two, being the government automobile.

The Clerk: Exhibit 5.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Richard): I show you another photograph in which, I believe, you are shown in the picture. Is that you, Officer?

A. That's right.

Q. And what is that?

A. That is a picture of the government car before the body was removed; Mr. Hadley's body, we removed.

Mr. Richard: We offer that, if your Honor please.

The Clerk: Exhibit 6. [83]

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Richard): Now, I show you this photograph and ask you if it represents the other automobile? A. Yes, it does.

Q. And does that fairly show the condition that automobile was in immediately after the happening of the accident? A. It does.

Q. Here is another view which is practically the

(Testimony of Ernest H. Schoening.)

same, except that it shows more of the windshield, is that right? A. That's right.

Q. And shows the area of the windshield there that apparently is broken out, whereas the first one did not. A. It does.

Q. But the second photograph I showed to you is a clear portrayal of the automobile operated by Mr. Wibye. Correct? A. It is.

Mr. Richard: We offer those, if your Honor please.

The Clerk: Exhibit 7.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Richard): Now, I show you this photograph which shows a roadway, and ask you if that shows the general location, a picture of the roadway taken at or near the place where this accident happened? [84]

A. It is.

Q. And that photograph is looking in which general direction?

A. It would be looking east or toward Dublin.

Q. And that would be looking downgrade or upgrade? A. That's downgrade.

Q. Now, you will notice——

Mr. Richard: We offer this, if your Honor please, in evidence.

The Court: All right.

(Testimony of Ernest H. Schoening.)

Mr. Richard: And I would like to use it just a minute.

The Clerk: Exhibit 8.

(The photograph referred to was admitted in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Deasy: May I ask one preliminary question, your Honor, before the document is received in evidence?

The Court: You want to know when they were taken, your Honor.

The Court: Were you present when these photographs were taken?

A. Both photographs, yes, sir. They were taken—yes, your Honor, they were taken by two different photographers. The two that I presented were taken immediately after the accident, at the scene of the accident; and the second one [85] was taken the second day afterwards.

Mr. Deasy: No, the one——

The Court: The cars were taken after?

A. That's right.

Mr. Deasy: The one I am particularly questioning about at this time, your Honor, is the one which the witness has just identified as showing the location of the roadway.

Q. When was this photograph taken?

A. To the best of my recollection, I think it was the next day or second day afterwards.

(Testimony of Ernest H. Schoening.)

Q. That would be either on the 9th or 10th of November?

A. November 10th, after the accident.

The Court: Were you present when that picture was taken?

A. I was.

Q. (By Mr. Richard): Now, in connection with Plaintiff's Exhibit 8, just in evidence, you will notice up here a sign on the side of the hill with the word "Park." Now, I show you this photograph which shows more of the sign, but you see a portion of it in each one, the "Park." Is that the same sign? A. That's the same sign all right.

Mr. Richard: Now, we offer in evidence the one showing the entire sign.

Q. I call your attention particularly to certain marks that [86] appear on this diagram, or upon this picture. Now this is looking in which direction?

A. That is looking east.

Q. And you will see in the right-hand lane, then, of the southbound traffic, is that right,—

A. That's right.

Q. (Continuing): —certain marks?

A. That's right.

Q. Is that correct? A. That's right.

Q. You also see upon the far side of the highway and leading across from the northbound lane, through the center lane and into the southbound lane, certain other marks? A. That's right.

Q. I will ask you whether or not you observed

(Testimony of Ernest H. Schoening.)

those marks on the highway immediately upon your arrival there? A. I did.

Q. And will you tell me——

The Clerk: The last photograph will be Exhibit 9.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. (By Mr. Richard): Now, I show you Plaintiff's Exhibit 4, the second photograph marked Plaintiff's Exhibit 4; and that is looking in which direction? A. Looks east. [87]

Q. In an easterly direction?

A. That's right.

Q. And in this exhibit, you will see certain tire marks upon the pavement. A. I do.

Q. Those tire marks at the east end have a curve somewhat, do they not? A. That's right.

Q. Where, with reference to the Wibye automobile, do those tire marks end?

A. They continue on to the Wibye car. That's the tire marks laid down by that particular car.

Q. The Wibye automobile?

A. By the Wibye automobile; yes, sir.

Q. In other words, those are in the southbound, right-hand lane? A. That's right.

Q. Is that correct? A. That's right.

Q. Did you measure those marks upon the highway that afternoon? A. I did.

Q. Will you give us their approximate length?

A. Approximately 33 feet.

(Testimony of Ernest H. Schoening.)

Q. Now, with reference to the right—withdraw that. There has been testimony here this morning to the effect [88] that at that location, there are three lanes of traffic, three lanes for driving.

A. That's right.

Q. With a black top covering.

A. That's right.

Q. And upon the right-hand side, there was a shoulder beyond the black top, of approximately three or three and a half feet.

A. Yes, sir; that was a paved shoulder of about three or three and a half feet.

Q. But of different material than of the black top on the top, is that correct?

A. Sometimes the same material. The term "shoulder," as defined by our department is the paved portion. It may be beyond that dirt—beside that—but there is approximately a three feet paved edge called the shoulder.

Q. Now, calling your attention to this photograph here, it would indicate that there are two parallel skid marks.

A. That's right.

Q. And where, with reference to the right-hand edge of the black top is the mark, indicating the right wheels, of course?

A. The right tire mark was on the shoulder off of what we call the paved portion of the road.

Q. Off of the paved portion of the road? [89]

A. Of the roadway; yes, sir.

(Testimony of Ernest H. Schoening.)

Q. Now there are also, are there not, upon this second photograph, marked Plaintiff's Exhibit 4, certain marks upon the other side of the highway and in the middle lane? A. That's right.

Q. Is that correct? A. That's right.

Q. Where do those marks start now? By the way, I mean the west end of those marks.

A. The west end?

Q. I beg your pardon, I mean the east end, the down-hill end.

A. The east end, they started from the north—the west bound lane, as we would term it, or the north side of the highway.

Q. The north side? A. Yes.

Q. And where did they end?

A. They circled over across the roadway, the three lanes to the south side of the highway, the shoulder.

Q. Did you mark those? A. I did.

Q. And did you measure them? A. I did.

Q. Their length is approximately how much?

A. 120 feet. [90]

The Court: Are those what you referred to as tire marks? A. Yes, sir.

Q. And it is not the ordinary tire marks, but the kind of marks that are made when the wheel skids?

A. That's right. It's tire marks made by a wheel——

Q. Has no motion?

(Testimony of Ernest H. Schoening.)

A. (Continuing): ——that has been stopped; has no motion.

Q. (By Mr. Richard): Will you tell me this: Where the west end of those marks ended with reference to the two automobiles as they rested there after the accident was all over?

A. They led up to the Plymouth automobile, the government car.

Q. Now, I believe you said that when you arrived, the occupants of the Wibye automobile had been removed? A. That's right.

Q. What was the condition of the weather, as you recall it?

A. The weather was dry and clear.

Q. Was the pavement dry at that location?

A. It was.

Q. Could you tell us the approximate width—withdraw that. Those photographs indicate that the lanes were marked off by white lines.

A. Yes, sir. [91]

Q. Do you recall the approximate width of the lanes? A. Approximately eleven feet each.

Q. And then in addition to the eleven feet on the south side, I take it from your testimony there was a three foot paved shoulder, is that right?

A. That's right.

Mr. Richard: You may cross-examine.

(Testimony of Ernest H. Schoening.)

Cross-Examination

By Mr. Deasy:

Q. Having reference to these photographs which show these markings on the roadway, Mr. Schoening, that is, specifically with reference to Plaintiff's Exhibit No. 4, this is the one which shows the picture of a tow car there, was this picture taken on the day of the accident, shortly after the accident?

A. Immediately after the accident.

Q. What time was it when you arrived at the scene there? A. Approximately 4:50 p.m.

Q. Was the tow truck called by you or had it already arrived on the scene?

A. The office had dispatched the tow car.

Q. And the marks which show here leading behind the tow truck here, you say, were made by the car operated by Mr. Wibye? A. That's right.

Q. And those were made as a result of the braking of the [92] wheels, isn't that right?

A. That's right.

Q. By the application of the brakes of the wheels? A. That's right.

Q. Now, you stated there is another mark which shows more faintly on the photograph here in a curving fashion around from this south lane over into the north lane? A. That's right.

Q. Is that a similar skid mark?

A. No, it's not as heavy as a skid mark. It's a tire mark. That particular contour would be more of a skid.

(Testimony of Ernest H. Schoening.)

Q. Now this portion which shows running in a curved direction from the north over through the middle to the south lane of the highway, do you recall, Officer, whether or not that mark was such as would be made by a wheel sliding in a sideways fashion?

A. No, the other picture, it wasn't wide enough for an entire width as we would call—where you would see an ordinary tire. A tread of six inches would widen out to twelve inches.

Q. It is a fact, isn't it, that when a car slides that sidewise direction, like, for instance, the slipping on ice or on some object that causes the wheels to slide sidewise, it makes a different mark than those which are made by the tires of a car proceeding straight with the brakes on? [93]

A. That's right, on a whip would make a wider tread mark than a car going in its actual position—or not a position, but the actual method of it going around such as it shows here.

Q. Well, from your experience with the Highway Patrol, Officer, would you say that the marks which you observed which were apparently made by the government car, which I think you stated were 120 feet in length, were made by that car with the brakes on?

Mr. Richard: I think, if you Honor please, we object to that upon the grounds it calls for the conclusion and opinion of the witness. He could testify as to the appearance. I believe beyond that he is

(Testimony of Ernest H. Schoening.)

not qualified as an expert witness upon that particular point.

The Court: Well, how long have you been with the Highway Patrol? A. A few years.

Q. Have you had occasion to examine these skid marks a number of times? A. I have.

The Court: I think that is a field in which there is rather a common knowledge. I think the objection goes more to the weight of the testimony than the admissibility. I will overrule the objection. If you can answer that question—do you want it read again? [94] A. If you will, please.

(Question read.)

The Witness: I would say that the brakes were applied; because if it had been free wheeling, there would not have been any marks on the contour of that line.

Q. In other words, if the wheel were revolving, you wouldn't have had as emphatic an impression the ground as you would have in the case of where the brakes were applied? A. That's right.

Q. And those marks become more discernible and more evident if there is sufficient pressure on the brakes to stop the wheel from moving entirely? Is that what you mean? A. That's right.

Q. (By Mr. Deasy): Now Officer, when you measured these 120 foot marks, did you examine the ground in the area where the marks started in the northern lane, that is, the easterly end of this mark

(Testimony of Ernest H. Schoening.)

apparently made by the government car? Did you examine the area of the highway in that vicinity?

A. For what reason?

Q. Well, I was going to ask you, did you observe whether or not there were any oil or foreign substances there over which the wheels might have gone before making these marks?

A. That's right; we do investigate that, as our reports cover that particular situation to show whether or not road conditions have any obstructions or any debris of any kind [95] on there to cause a skid of any kind.

Q. Well, do you recall whether or not there was any foreign substance on the highway?

A. There was nothing on the highway to indicate any skidding or any reason for any skidding.

Q. Well, was there anything at all on the highway there which could have gotten on the tires and made this mark?

A. No, there wasn't; if you refer to oil or loose gravel, there was nothing like that at all.

Q. I mean any liquid or powdery substance that could have gotten on the tires and just made that as the wheels revolved? A. No, there was not.

Q. You interviewed or attempted to interview the two injured parties from Mr. Wibye's car?

A. I did.

Q. On that evening? A. That's right.

Q. Were you able to obtain any statement from them as to the occurrence of the accident?

(Testimony of Ernest H. Schoening.)

A. I have a short statement from both parties that was taken at the Fairmont Hospital some time after the accident, possibly an hour and a half or two hours afterwards.

Q. Were they in condition to talk to you at all?

A. Well, I spoke to them; yes. I asked them both what happened, to give me their reasons for the accident. [96]

Q. Were either Mr. Harold or Mr. Nels Wibye able to tell you how the accident happened?

A. Well, they both gave me a short statement.

Q. Do you recall what statement Mr. Harold Wibye gave you as to the occurrence of the accident?

A. Harold Wibye said that he passed Castro Valley and went up the long hill and started down. "I passed a car somewhere before I started to turn, and that's the last I remember." That's all I could get from Mr. Harold Wibye.

Q. What, if anything did Mr. Nels Wibye tell you?

A. Mr. Nels Wibye said that, "Going towards Bakersfield from Oakland, and I couldn't say what happened, as I was not driving. I was probably lighting a cigarette." That was the extent of what I could get from Mr. Nels Wibye.

Q. Do you recall, or do your notes show, Officer, what time you talked to them?

A. No, not at the hospital; but to the best of my knowledge, it was immediately after clearing the highway. At the time of the accident, I had to wait

(Testimony of Ernest H. Schoening.)

for the Coroner to arrive and stay there until the accident or the highway was cleared of both cars, and then I immediately proceeded to the hospital.

Q. So you think it was probably an hour or two, is that right? A. Within two hours; yes. [97]

Mr. Deasy: I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Officer, you saw these men at Fairmont Hospital, not at Providence? A. Fairmont County.

Q. Between San Leandro and Hayward?

A. That's right.

Q. And I believe you told me that they had already been taken away from the scene when you first arrived at the scene of the accident?

A. That's right.

Q. And both men appeared to be pretty well banged up and pretty much hurt?

A. That's right.

Q. I just have this, if it would be of—(Showing photograph to Mr. Deasy)—I just show you a photograph that shows pretty clearly the right-hand side of the government automobile where you can see the number 142857, and ask you if that photograph fairly represents that portion of the automobile owned by the government shown in that picture as it existed immediately afterwards?

A. It does.

(Testimony of Ernest H. Schoening.)

Mr. Richard: We will offer that, if your Honor please.

The Clerk: Exhibit 10.

(The photograph referred to was admitted in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Richard: No further questions, your Honor.

Mr. Deasy: I have no further questions.

Mr. Richard: The officer may be excused, your Honor?

The Court: Yes, sir.

(Witness excused.)

Mr. Richard: May it please your Honor, I am very much embarrassed, but Dr. Fisher, who your Honor will was here ready to testify when the matter was on about six or seven weeks ago, was operating today and then it was necessary for him to go to Pittsburg on a matter where he has office hours certain days in the week, to operate up there; and I was under the impression that I would not finish with my witnesses. I perhaps anticipated something that didn't happen, that there would be an ex parte calendar this morning. There wasn't any at all. Dr. Fisher told me that he simply did not feel, in view of his duty to his patients, that he should come today, in view of the schedule of his operation. He will be here at 10:00 o'clock tomorrow morning.

The Court: You have no further witnesses?

Mr. Richard: We do not.

The Court: Are you going to have any witnesses, Mr. Deasy, at all?

Mr. Deasy: I have one witness, your Honor, but I had anticipated making certain motions with reference to the [99] case prior to putting on any evidence.

(To Mr. Richard): I am assuming that you have only the medical testimony to be added to the case?

Mr. Richard: That is correct.

The Court: Well, if you have some motion, you could make them then, if counsel is satisfied, if they have to do with other phases of the case than medical.

Mr. Deasy: Yes, your Honor.

The Court: Would that be agreeable? We could use the time on that now.

Mr. Richard: Yes, your Honor.

The Court: All right.

Mr. Deasy: At this time, your Honor, I would like to make a motion on behalf of the United States for a judgment in favor of the defendant, the United States, in each of the cases upon the grounds that the evidence is not sufficient to support the claims made by the respective plaintiffs in these cases. These suits are brought under the Federal Tort Claims Act which allow suit against the government in the United States District Court for personal injuries suffered by persons who are injured as the proximate result of the careless or wrongful act or omission on the part of an employee of the

United States while acting within the course and scope of his employment, and the only evidence presented to the Court upon the phase of the case involving [100] the employment or agency of the government employee referred to in the pleadings is the allegations in the pleadings that he was an agent of the United States, which is admitted, that he was an employee of the United States; and the allegation that he was acting within the course and scope of his employment and in line of duty at the time of the accident, which has been denied.

Now, there is some testimony here that the car involved was an olive-drab car; that it was an Army car; that it was a Plymouth; and the photographs which have been offered in evidence and received in evidence indicate that the automobile involved here was apparently an automobile belonging to the United States Army, and that it was involved in this accident. Now, bearing in mind, as in any other case, the burden of proof lies upon the plaintiff to establish the allegation of his complaint in order to entitle himself to relief, I feel that there is a failure of proof here in relation to the operation of the government vehicle at the time of the accident. It appears that the accident took place in the neighborhood of 4:40, or thereabouts, in the afternoon. The testimony of both plaintiffs and the Highway Patrol Officer places the time of the accident about that time, and there is no testimony here from anyone as to the purpose for which the car was being operated, as to whether or not the

car was actually being operated on government business, or any [101] testimony whatsoever, except what we can glean from the pleadings and from the evidence here, that Mr. Hadley was an employee of the United States and that he was driving a government automobile; at least an automobile bearing——

The Court: I thought it was admitted that Hadley was an employee of the United States.

Mr. Deasy: Of the United States; yes, sir.

The Court: Was it admitted that it was a government vehicle?

Mr. Richard: Yes.

Mr. Deasy: We will admit that, your Honor.

The Court: So that the question is whether or not he was driving in the course—whether or not the accident occurred while the employee was acting within the course of his employment or within the scope of his duty.

Mr. Deasy: Yes, your Honor. Now, I think that some burden lies upon the plaintiff to establish that fact since it is not only one of the factors essential to enable him to establish his claim, but it does in point of fact go to the very jurisdiction of the Court to hear the case, because if this man was not acting in line of duty at the time, then this is a suit which would not lie; and this Court has jurisdiction to hear this type of suit only where there is, in fact, an injury caused by a person acting within the line of duty. [102]

Now, as to whether or not there was any negli-

gence on his part, the only evidence which is before the Court is the evidence of the photographs and the testimony of Mr. Harold Wibye that this automobile came over onto the other side of the road. As to how it happened to come over onto the other side of the road, there is no evidence at all.

The Court: Well, of course, that's sufficient *prima facie*. The evidence is sufficient *prima facie* to establish negligence if the man was in the course of his employment at the time. The testimony of Mr. Harold Wilbye would be sufficient.

Mr. Deasy: Yes, your Honor, I might say in that regard that there is nothing before the Court to establish whether at the time that this impact occurred, or the time that this automobile came over suddenly from its own proper portion of the highway, into the other portion of the highway. There is nothing before the Court to show whether or not Mr. Hadley was alive at the time that this car suddenly came over to the other side of the road.

The Court: That would be something to require the proof of the negative testimony. It would be impossible for anyone to, except by some possible expert method testimony; but that has nothing to do with the *prima facie* of the case.

Mr. Deasy: No, but it has connection with the other point which I have mentioned. [103]

The Court: The other point is entirely a different matter but I don't think there is any matter in the point that there hasn't been any proof of negligence; that is, a *prima facie* case of negligence has been

made. You wouldn't want any clearer case. If a man drives down the right side of the highway and the man cuts directly in front of him in the middle of the highway, I wouldn't want any stronger case of negligence itself; but the other point is a different matter. I have been wondering about that. What is your point of view with respect to that matter, Mr. Richard?

Mr. Richard: If your Honor please, it is simply this: Now, I am sure there is no misunderstanding. The defendant admits that the automobile belonged to the United States Government; that Hadley was the employee of the United States Government at that time.

The Court: No, he didn't say that.

Mr. Richard: Yes, Hadley was the employee of the United States Government at the time, so the question which is left is whether or not he was in the course of his employment.

The Court: You haven't quite correctly stated it. The Government has admitted it was a government automobile and that the dead man was an employee of the United States?

Mr. Richard: That's right.

The Court: Now, whether he was in the course of his employment at the time of the accident is the issue which they have denied. [104]

Mr. Richard: That is correct.

The Court: Yes.

Mr. Richard: Now there is one other thing. As your Honor has mentioned, I have a certified copy

of the death certificate of this man, showing that the cause of death was shock and hemorrhage due to numerous fractures of the ribs and lacerated liver and right kidney, that I would be glad to offer in evidence, if your Honor desires it.

The Court: You can offer it, but that doesn't add anything.

Mr. Richard: Except I think it does go to the question raised by him as to whether or not the man was alive. In other words, that shows a trauma was the cause of his death. That is my opinion.

Now, if your Honor please, going to the other point——

The Clerk: Are you offering this?

Mr. Richard: Yes, we do.

The Clerk: Exhibit 11.

(Certificate of Death of John Elliott Hadley was then admitted in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Richard: If your Honor please, where we have the ownership of the automobile and the employment admitted or proved—in other words, we have shown here the automobile belongs to the United States Government; that the driver of that automobile was an employee of the United States Government, [105] and in such a situation an inference arises, a presumption arises in which it is proof in the effect that that man was in the course of his employment at the time it happened.

I call your attention first to the case of Bushnell versus Washika Tashiro. The citation is 115 Cal.

App. 563; *Westberg versus Wilde*, 14 Cal. App. 14 Cal. 2nd, 360.

The Court: 14 Cal. Second?

Mr. Richard: Yes, 360. A very late case in 1941, *Shields and Jenkins versus Oxnard Harbor District*, 46 Cal. App. 2nd, 477.

And I think there is a very good statement in the first case I cited, the *Bushnell* case. The decisions are uniform in holding that in an action for damages against an employer for physical injuries caused by the negligence of his employee while operating the employer's automobile, proof that the automobile belonged to the employer, and at the time of the accident was being operated by the employee, raises an inference sufficient to establish a *prima facie* case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment, and that the burden is then upon the defendant to overcome or dispel any such inference by proof of facts to the contrary. Among the numerous cases so holding are: 35 Cal. App. 39 Cal. App., 89 Cal. App: “. . . and it is further held that such inference is not destroyed or overcome as a [106] matter of law because it is contradicted by the testimony of the employee or of other witnesses produced on behalf of the defendants, but that the issue remains one of fact for the determination of the jury.” In other words, it is the same inference that we find in the *Shelly* case against Southern Pacific in the line of cases in California upon that line on the presumption of due care.

In the recent case of Shields and Jenkins that I mentioned, there is the same holding, and they hold there that: "the presumption arises and the testimony of the employee himself that he was not in the course of his employment does not dispel the inference as a matter of law but merely creates conflict."

In Westberg versus Wilde, which of course is a leading case upon the proposition of the continuing presumption, there is this statement made: ". . . in refusing to recognize the verdict for him on the grounds that Wilde was not acting in the course of his employment where the accident took place. The fact that Wilde was an employee of Talsky, driving the car owned by him, gives rise to an inference that Wilde was acting within the course and scope of his employment."

Citing 1 Cal. App. 2nd, 151; Cruz vs. White Brothers, 91 Cal. App. 86; Moppin vs. Solman, 41 Cal. 323, which are cases different than the ones that are cited in the [107] first case that I read to your Honor: "This inference is not dispelled as a matter of law by the evidence to the contrary." Then, simply calling your Honor's attention to this, certainly that under the rule of Erie Railroad versus Tomkins, 304 U. S.—"It is certainly the law that"—I don't have to go to the Erie case; the statute itself says that the United States would be as if it were a private person under the laws of the State.

Section 401A of the Tort Act itself is the one that so provides.

The Court: Except there is one question that has arisen in my mind concerning this matter, Mr. Richard, and that is, ordinarily the liability of the United States under the Tort Claim Act is itself liable as if it were a private person and has a liability as a private person under the laws of the State where the tort occurred. That is, in effect, what the statute says. The statute does, however, in establishing the liability of the United States, say that it shall only be liable for the acts of its agents committed in the course of its employment.

Mr. Richard: That's very true.

The Court: And it may be that the mere rule—that the rule of proof required under the rule of inference, or evidence under the state law might not be sufficient to satisfy the specific requirement of the statute that the [108] United States shall not be liable unless except upon proof that the employee was acting within the scope of his employment or within the call of duty.

Mr. Richard: Yes, I understand. In other words, then, your Honor would necessarily take the position that because there was a statute in this case that you had to go farther than the established common law or case law of any particular state.

The Court: Well, whether or not an inference would be sufficient under that statute, I just say that I have never had that question as yet and I don't know that there are any decisions on that, and there is some question that arises in my mind——

Mr. Richard: But, as far as that is concerned, we rest this motion upon this authority, if your Honor please.

The Court: Yes. Have you anything to say on that?

Mr. Deasy: No, your Honor, only this: That, as your Honor's remarks to Mr. Richard just indicated, my feeling with regard to this is that it is incumbent upon the plaintiffs under the Tort Claims Act to prove that, as a matter of fact, the government employee was acting within the line of duty, because the whole basis for liability of the United States rests upon that situation; only where there is the act of an agent or an employee, I should say, acting within the actual course and scope of his employment or in the line of duty. [109]

Now, it is all very well, that in the State of California, there are decisions in suits between private parties, certain inferences arise from the fact that a man is driving another man's automobile, and there is a relation of employer and employee there that a prima facie case can be made out by mere proof of those facts that an inference or presumption arises that he was on the employer's business, but I don't understand the Tort Act to contemplate such a situation where the mere proof that a man, for example, a soldier in the United States Army, is driving an Army car, that the mere proof of that establishes a prima facie case of his acting within the line of duty, because that goes to the very heart of it.

The Court: It goes to the question of the substance of liability, particularly in a case as this is, of course, where there is a waiver of some immunity and where there has to be a strict construction of the statute where the United States consents to be sued. I think there is a little more to this question than just the rule of evidence under California law. I am not saying that you are wrong about that, but I think there is a little more to it than merely the question of whether or not the rule of evidence that is applied in California as between private parties necessarily would be sufficient to sustain the burden of proof under [110] the Federal Tort Claims Act. I think not of this precise question, but the question of whether or not there have been some cases—I had one that you tried, Mr. Deasy, involving that ulcer case.

Mr. Deasy: The malpractice case that happened out where an operation was performed at one of the government hospitals.

The Court: Yes, but if your Honor please, isn't there the question one of ostensible authority? There isn't any question that that does not exist, but that question does not arise here. In others words, as I understand that case there was a question——

The Court: That case is not authority; it doesn't go into the question that we have here.

Mr. Richard: Yes.

The Court: I merely referred to it because there, I did go into the question of what constitutes

scope of employment and only is indicative of the fact that there is rather a strict construction under the Federal Tort Claims Act when it comes to the question of scope of employment.

Mr. Richard: But didn't that arise because of the fact that the person who was operated upon was not that class of person whom, under the statute, was entitled to the treatment?

The Court: That's right, that would be very true.

Mr. Richards: That goes more to the question, of course—the doctor says, “Yes, you come in and you be operated on,” [111] and there was apparent authority existing. I fail to see where there is an analogy between the two situations.

The Court: No, I wasn't intending to indicate that there was any analogy between the two situations. I merely cited that because there has been some considerable number of cases on the question of jurisdiction of the court arising in connection with the matter of limits of authority and scope of employment; and to the extent that it might be considered as a jurisdictional question, that was all that I was intending to say, that there might be more to it than simply the question as to whether or not this rule applies in California. There is no doubt of it that it is sufficient for a *prima facie* case. As to whether or not that satisfies the jurisdictional question where the liability of the United States for the act of an agent committed within the scope of his employment is involved, you have a little diverent question than you have in the private

cases, because when you have the Common Law doctrines or the cases which construe statutes in tort matters, you would there have a different question entirely. A man in business has got an automobile and he uses it in the course of his business and his driver is using it and someone is injured, you have there a reason for this presumption and inference that you have cited; but when the United States announced that it was going to assume the liability and give up its sovereign [112] immunity to suit, it was specific in stating that it was only in those cases where it was shown that the man was acting in the scope of his employment; so that there may be more of a question of substance rather than rule of evidence involved there, and it may be that upon study, that this rule of evidence is sufficient to satisfy. That, I am not attempting to decide here at the moment, but I think that both of you should think it over a little bit and we will submit the question with the case, and we will go ahead and take the evidence. I am not going to rule upon it; I will reserve ruling, but I think that, considering the serious nature of the claims involved in this case, it would be well to give some study to that question.

Mr. Richard: Yes, your Honor.

The Court: Because, if you are right, and if I decided this case in favor of the plaintiffs and make an award in that case and find out afterwards that you might have said at the time that you didn't mean——

Mr. Richard: That's right.

Mr. Deasy: If your Honor please, is it your Honor's *attention* that this motion should be submitted at this time and deferred until——

The Court: I will defer ruling on the motion until the case is decided and decide it with the case, so that tomorrow, you can put the testimony on, if you wish. [113]

Mr. Deasy: I have a witness whose testimony will only take a matter of minutes.

The Court: Is there any objection to putting him on out of order?

Mr. Richard: No.

Mr. Deasy: But seeing that the plaintiff's case is completed with the exception of the medical, may I, without prejudice to the motion, call this witness, your Honor?

The Court: Do you have any objection to that?

Mr. Richard: None whatsoever.

The Court: Very well.

Mr. Deasy: Mrs. Fipps.

EDNA D. FIPPS

called by the defendant, sworn.

The Clerk: Please take the witness chair. State your name to the Court.

A. Edna D. Fipps.

Direct Examination

By Mr. Deasy:

Q. Where do you reside, Mrs. Fipps?

(Testimony of Edna D. Fipps.)

A. In San Francisco.

Q. How long have you lived in San Francisco?

A. Oh, for many years; probably thirty years or more.

Q. In November of 1946, where were you living in San Francisco?

A. I was living at 618 17th Avenue. [114]

Q. In San Francisco?

A. In San Francisco; yes.

Q. And you are the mother of John E. Hadley who has been mentioned here, is that right?

A. Yes, I am.

Q. And you know the day on which he was involved in an accident was on the 8th of November, 1946?

A. Yes.

Q. When was the last time that you talked to him?

A. Well, it was on Thursday, November 8th.

Q. That is, the date of the accident?

A. No, I mean November 7th. I beg your pardon, it was on November 7th, but he 'phoned me from Stockton saying that he would have——

Mr. Richard: No, now just——

Q. (By Mr. Deasy): He called you from Stockton; is that right?

The Court: That was the day before the accident?

A. Yes.

Q. (By Mr. Deasy): What was his employment at that time?

A. Well, he was liaison representative for the——

(Testimony of Edna D. Fipps.)

The Court: Where was he stationed?

A. I think it was the Quartermaster Depot in Stockton, California, but he resided, though, in Seattle, I mean he was stationed there and he did this work; but the Stockton [115] Depot, I think, was the main one; and he had to report there every three months or so; and that's what he was doing when he was here. He was to report at the Depot at Stockton.

Q. (By Mr. Deasy): And he 'phoned you from Stockton, is that right? A. Yes, he did; yes.

The Court: I think I will strike that answer out that he had to report there, because that is a hearsay statement.

The Witness: How?

The Court: I merely wanted to find out from the witness—I merely asked the witness where her son was stationed and she said he was stationed in Seattle, worked for the government out of Seattle. That's what she said.

Mr. Deasy: I believe, your Honor, that the Stockton Depot is a sub-depot of the General Quartermaster Depot in Seattle, or some such arrangement of that kind.

Mr. Richard: I don't know.

The Witness: I absolutely know he was here on business. I know that's what he reported.

The Court: I wish you wouldn't volunteer these statements, because I have an important case to decide; and don't make any statement about a matter

(Testimony of Edna D. Fipps.)

of that kind, because then you are arguing and you get something into my mind that I shouldn't have that isn't competent. As a matter of fact, you don't know that, except what somebody told you. That's [116] fairly right, isn't it? You say you know he was here on business. You only know that because somebody told you that. The Government of the United States didn't tell you that, did they?

The Witness: I know what they decided.

The Court: It was because somebody told you that. A. No, I have it in writing.

Q. (By Mr. Deasy): He called you sometime on the day before the accident from Stockton, is that right? A. That's right.

Q. What time of the day was that?

A. Well, I should say it was between three and four o'clock. I don't know exactly the time but between three and four in the afternoon.

Q. And at that time, did you make an appointment to meet him?

Mr. Richard: Now, just a minute. That's calling for the content of the conversation, I presume, which is hearsay. I object to it upon that ground and as incompetent, irrelevant and immaterial.

The Court: What was the point of this, Mr. Deasy?

Mr. Deasy: Well, your Honor, my understanding is that this lady did have a conversation with her son, the purport of which would disclose what he was doing at the time that this accident occurred,

(Testimony of Edna D. Fipps.)

and goes to the point of whether or [117] not he was engaged upon his business at that time.

The Court: Do you mean that you have in mind to show that at the time of this accident he was on the way to keep an appointment with his mother?

Mr. Deasy: Yes, your Honor. In view of the fact that the government employee himself is deceased and this lady is in a position to throw some light on the purpose of the trip which was being made, I think it is competent evidence.

Mr. Richard: If your Honor please, as far as the government is concerned, is it not a self-serving declaration? It is not a statement against interest as far as the individual is concerned, neither pecuniary nor proprietary, or subject to the hearsay rule. The man being dead, I mean if that is the testimony, where is the——

The Court: I think that I shall allow the witness to testify only as to whether or not—as to when and where, if she did have, she had an *appoint* with the son, even though it is based upon the conversation that she had; but no further than that.

Mr. Deasy: No, it was not my intention to elicit any conversation as to anything he may have said as to his plans as to whether he was coming or going——

Mr. Richard: Now here. In other words, you want to get in what you want and then I can't cross-examine her on anything. [118]

Mr. Deasy: You can cross-examine her on anything.

(Testimony of Edna D. Fipps.)

Mr. Richard: Well, if that is the case, let's let it go. I will withdraw my objection.

The Court: Well, now, the question is now whether or not the last question that was asked the witness was the substance in subject. She had an appointment, had made an appointment to meet her son.

(To the witness): You may answer that yes or no.

The Court: All right. Then the next question is?

Q. (By Mr. Deasy): As to when and where the appointment was made.

A. I expected him around 6:00 o'clock. He was having dinner with me that evening.

The Court: You had made an appointment for him to have dinner with you that evening at 6:00 o'clock?

A. That's right.

Q. That is, the evening of the day before the accident?

A. That was the day of the accident.

Q. I see; the evening of the day of the accident.

A. Yes; the evening of the day of the accident.

Q. (By Mr. Deasy): Where was he to have dinner with you?

A. At 618 17th Avenue where I was residing at the time.

Q. That was your home?

A. Yes; that's right.

Q. And what time did you say the appointment was for dinner? [119]

A. 6:00 o'clock.

Mr. Deasy: I have no further questions.

(Testimony of Edna D. Fipps.)

Cross-Examination

By Mr. Richard:

Q. Mrs. Fipps—is that correct, Fipps?

A. Yes; that's right.

Q. (Spelling): P-h-i-p-p-s?

A. (Spelling): F-i-p-p-s.

The Court: Mrs. Fipps, I don't want you to think I was being harsh with you before. I just have to be careful that you don't testify to anything that you don't know of your own knowledge.

The Witness: I see.

The Court: Go ahead, counsel.

Q. (By Mr. Richard): Do you reside at this same address now?

A. No, I reside at 1427 Filbert Street at the present time.

Q. Now, do I understand that, between 3:00 and 4:00 p.m. on Thursday, November 7th, that you had this conversation? A. That's right.

Q. That was conversation between your son and yourself? A. Correct.

Q. Were you at home when this call came?

A. Yes.

Q. And at that time, you had a telephone in your home or apartment? A. Yes. [120]

Q. How long had it been since you had last seen your son?

A. Oh, it had been several months, and I haven't seen him since he had been assigned to Seattle which,

(Testimony of Edna D. Fipps.)

I think, was the latter part of May, I think, he had to report there—June first, and I hadn't seen him since he had left for Seattle.

Q. Had you had a telephone conversation with him during that interval? A. During the——

Q. Before the one on Thursday of November 7th?

A. Well, he called me Wednesday the 6th of November saying he was supposed, in the first place, to come on Thursday the 7th but he hadn't completed his work yet, and the object of the 'phone call on Friday, November 6th was—or I mean, Thursday, November 7th, was to tell me that he would be there on Friday, the 8th; that he couldn't make it this Thursday, because he hadn't finished his work yet.

Q. In other words, he called you on Wednesday and told you that he would come over on Thursday?

A. That's right.

Q. Then he called you on Thursday and said that he would not be able to complete his work at Stockton on Thursday? A. That's right.

Q. And he would come on Friday?

A. That's right; that's perfectly right; perfectly straight. [121]

Q. Did he tell you in the conversation that you had with him on Thursday as to when he would complete his work in Stockton?

A. Well, he was supposed to have completed it then in time to come down Friday, to come to San Francisco.

(Testimony of Edna D. Fipps.)

Q. In other words, that was all you know, that he said that he would get through up there in time so that he would come down in San Francisco and have dinner with you?

A. Yes, on Friday, on his way home. He was on his way back to Seattle.

Q. All right. Now, did he say to you or indicate to you that he had any other business in San Francisco than come down to have dinner with you—I mean, or on the way down from Stockton that he had any business?

A. Well, he did mention that he had some business at the Finance Office in San Francisco; that he was stopping by there.

Q. Now, when did he tell you that?

A. On Thursday.

Q. In the telephone conversation?

A. That's right; Thursday.

Q. In the Finance Office in San Francisco?

A. That is correct.

Q. Can you paraphrase——

A. I beg your pardon?

Q. (Continuing): ——that portion of the conversation that you had with him in which he said that he would be down in [122] time to have dinner with you? A. Yes.

Q. Can you paraphrase it? Could you tell us the substance of it?

A. Oh, well, he said that he would be delayed, but he hadn't gotten through as quickly as he had

(Testimony of Edna D. Fipps.)

expected to, therefore, he could not keep the appointment on Thursday, but that he would be down Friday.

Q. All right. He would be here in time for dinner about 6:00 o'clock?

A. Yes; that's right.

Q. Now, can you paraphrase that portion of the conversation in which he mentioned that it was necessary for him to call at the Finance Office?

A. That's right.

Q. All right, can you paraphrase that?

The Court: He means, what did he say about that?

The Witness: Well, he said—I will just have to think a minute because I haven't thought about that so much; but he said, "I want to call at the Finance Office, as I have some business I want to transact with them." That's what he said.

Q. (By Mr. Richard): That is the substance of it? A. That is the substance of it.

Q. All right. Now—— [123]

A. (Continuing): ——But I don't know the nature.

Q. What.

A. I don't know what he wanted to do.

Q. All right; that is what he told you?

A. That's what he told me.

Q. Now did he—withdraw that.

Mr. Richard: Could I see that itinerary that we discussed up in your office?

(Testimony of Edna D. Fipps.)

(Mr. Deasy hands to Mr. Richard a document.)

Q. (By Mr. Richard): Now, in this conversation that you had with him on either of these days, was anything said by him as to where had to be after he left Stockton?

A. Well, he said that he had to be in Seattle on the 11th of November.

Q. On the 11th of November?

A. Yes, on the 11th of November.

Q. Your son met his accident, did he not, on a Friday? A. The 8th of——

Q. The 8th of November? A. Yes.

Q. And he told you that he had to be back in Seattle on the 11th? A. The 11th.

Q. Which would be the following Monday?

A. That's right. [124]

Q. He had been an employee of the United States Government for some considerable time?

A. Yes, he had, ever since he was released from the Army. He was in the Army, of course, during the war; and as soon as he was released—he had worked *before* the government before he went into the Army, however, and he went back. He was a Civil Service employee, of course; and as soon as he was released from the Army, he went back to be a government employee again.

Q. Approximately when was he released from the Army? A. Oh——

Q. 1945?

(Testimony of Edna D. Fipps.)

A. I think so; I can't just exactly remember.

Q. As far as you know, he had no other employment than for the United States Government at that time? A. No.

Q. Do you recall whether or not—when you stated that he had to call, did you say “Finance”?

A. Finance.

The Court: Finance Office, she said.

Q. (By Mr. Richard): Finance Office?

A. That's right.

Q. Of the Government or the United States?

A. Well, it was the United States Government Finance Office—I presume it was. [125]

The Court: He just wants to know what he said.

Q. (By Mr. Richard): Did he use the words?

A. I would say the words, “Finance Office.”

Q. Finance Office? A. Yes.

Mr. Richard: I have no further cross-examination.

Redirect Examination

By Mr. Deasy:

Q. Mrs. Fipps, with regard to a portion of the conversation with relation to stopping at some Finance Office, do you recall whether or not your son said it was for the purpose of picking up a check?

A. He did say something about a check. I don't know whether it was cashing a check. I think it was that he was going to cash some checks there, but whether that was all of it, I don't know.

(Testimony of Edna D. Fipps.)

The Court: Well, we have to be careful to distinguish between what is conversation and what isn't in connection with this testimony.

Q. Did your son say that he was going to cash a check at the Finance Company? A. He did.

Mr. Deasy: I have no further questions.

Recross-Examination

By Mr. Richard:

Q. Well now, in your last answer, you said something about picking up a check. [126]

A. Well, he didn't say anything about picking up a check; he did say something about cashing a check, though.

Q. But you don't remember what it was?

A. Well, I don't remember definitely. He said he was going to cash a check there, but——

Q. That is all you remember about that portion?

A. That's all that I remember about that; yes.

Mr. Richard: I have no further questions.

Mr. Deasy: No further questions.

The Court: That is all.

We will take a recess then until tomorrow morning at 10:00 o'clock; and then you will have the doctor here then?

Mr. Richard: Yes, sir.

(The court was then adjourned until 10:00 o'clock a.m., July 29, 1949.) [127]

Friday, July 29, 1949, 10:00 o'clock a.m.

The Clerk: Wibye versus the United States.

Mr. Deasy: Ready.

Mr. Richard: Ready. Dr. Fisher.

LLOYD D. FISHER

called by the plaintiffs, sworn.

The Clerk: Please take the witness chair.

Direct Examination

By Mr. Richard:

Q. Your full name is Lloyd T. Fisher?

A. Lloyd D. Fisher.

Q. And you are a duly and regularly licensed physician and surgeon? A. Yes, sir.

Q. Admitted to practice in the State of California? A. Yes, sir; I am.

Q. And you maintain your office where, Dr. Fisher? A. At 447 29th Street, in Oakland.

Q. Of what institution or institutions of learning are you a graduate, Doctor?

A. The University of California Medical School.

Q. And when did you finish the University of California Medical School?

The Court: Is there any question about the qualifications of the Doctor, Mr. Deasy? [128]

Mr. Deasy: I don't believe there is, your Honor, although I have never seen the Doctor before that I recall; but I will stipulate that he is a duly qualified physician and surgeon licensed to practice in

(Testimony of Lloyd D. Fisher.)

this state, and that he may testify as to the treatment that he afforded in this case.

Mr. Richard: If I might just ask a few questions, then:

Q. Do you specialize in any particular branch of medicine or surgery, Doctor? A. Yes, I do.

Q. What particular branch?

A. In orthopedic surgery.

Q. Orthopedic surgery is what, particularly?

A. Orthopedic surgery is that branch of medicine which deals with diseases and abnormalities of the muscular, skeletal system; that is, the bones, joints, ligaments, tendons.

Q. All right. Now, since your graduation, will you tell us briefly where you have practiced before opening up your offices in the City of Oakland?

A. Well, I trained, following graduation, in orthopedic surgery, one year at San Francisco Hospital; one year in Baltimore; two years at Charlottesville, Virginia, and the University of Virginia Hospital; and one year in teaching orthopedics on the University of Southern California Medical School Staff, in Los Angeles; and following that, I was—I have [129] been in Oakland at various locations.

Q. You opened your office in Oakland when?

A. Well, I first came to Oakland with the Permanente Hospital.

Q. In the orthopedic department?

A. Yes; and as orthopedic surgeon. And follow-

(Testimony of Lloyd D. Fisher.)

ing that, I have been in offices for myself. Let's see; it's since '45.

Q. All right. Are you a member of the staffs of any hospitals in the San Francisco East Bay Region? A. Yes, sir.

Q. And if so, which ones, please?

A. The Merritt Hospital; Providence Hospital; Childrens Hospital of the East Bay; Herrick Memorial Hospital; Alta Bates Hospital; the East Oakland Hospital; Alameda Hospital; Fairmont Hospital, and Highland Hospital.

Q. Fairmont and Highland Hospital are County Hospitals of the County of Alameda, is that right?

A. Yes, sir.

Q. Doctor, did you have occasion on or about the 8th day of November, 1946, to see Mr. Harold Wibye and Mr. Nels K. Wibye professionally?

A. Yes, sir; I did.

Q. Now which file do you have first, so at your convenience take them up that way?

A. Well, I have Mr. Harold Wibye's right at hand. [130]

Q. Where did you first see Harold Wibye?

A. I first saw him at the—I think I first saw him at Providence Hospital.

Q. Providence Hospital? A. Yes.

Q. On the evening of November 8th, what time did you see him? Was it before midnight?

A. Yes, sir.

Q. And did you at that time make an examination? A. Yes, I did.

(Testimony of Lloyd D. Fisher.)

Q. Will you tell us what your examination consisted of and what it disclosed, sir?

A. He had lacerations of his face; had lacerations of both knees, that is, penetrating the skin, subcutaneous tissue and the bone covering of the kneecap, exposing the kneecap on both sides. These were about four inches long, each of them; and he also complained of pain in his head and his neck and in his chest; and there was marked tenderness about the base of his skull in back and down his neck.

Q. Did you find spasm there?

A. There was a lot of muscle spasm, and also over the left shoulder, over the clavicle and over the head of the humerus, and he also had tenderness in his left chest in front up high and back near the scapula.

I had x-rays made of his left clavicle—that's the collar bone; of both knees; of his skull; and of his ribs.

Q. And those X-rays show, do they, any bony fracture of the bones or——

A. No.

Q. (Continuing)—abnormality?

A. No, they didn't. The only thing that they showed that was abnormal was in the bone—was a small metallic foreign body over the—in the jaw. One of the films showed the jaw. There was a metallic body under the skin.

Q. But you learned from the patient, Doctor, that was some thing that happened sometime before this accident?

(Testimony of Lloyd D. Fisher.)

A. It happened previously; yes, sir.

Q. All right. When you first saw him, was he in a condition of shock?

A. He wasn't in true surgical shock in the sense that his blood pressure was down, but he was in a state of nervous shock. I mean he was upset, disturbed, and in pain.

Q. Did your history disclose a period of unconsciousness?

A. Yes, the evidence showed that there was at the time of the accident; but, of course, when I saw him, it was later when he was conscious.

Q. Did you call in any neurologist?

A. Yes, I did because of the pain in his neck and the head injury which he had obviously had, and the pain going down his left shoulder and arm. I requested Dr. N. C. Norcross who is a neurosurgeon, to examine him. [132]

Q. Was there any complaint of the eyes?

A. Yes, there was. I was trying to think what they were at that time. I know what they are since very well, but—I don't recall exactly. There wasn't anything in the eye to look at it, as I recall; but he had pain radiating around the left side of his head particularly, and into the region of the left eye. I remember that distinctly.

Q. All right; and he has testified that he spent a period of about eight days, I believe, the first time in Providence Hospital.

A. Yes, sir.

Q. And he was under your care during that entire time, was he, Doctor?

A. Yes, he was.

(Testimony of Lloyd D. Fisher.)

Q. And after leaving the hospital, you continued to treat him, did you? A. Yes.

Q. Were the complaints after leaving the hospital generally about the same as the complaints that you found upon his admission in the first examination?

A. Yes, in general; but there was sort of a transition which took place; the pain going down the arm gradually subsided, whereas, the pain in the neck seemed to become more intensified; and as it eventually turned out, the neck trouble has given him—the neck injury has given him much more trouble [133] than the pain down the arm, which is gone.

Q. Was physiotherapy prescribed by you, Doctor? A. Yes, it was.

Q. And later on, neck stretching prescribed?

A. Yes; he had heat and massage; he had neck stretching—I had him in the hospital for a period of neck stretching as well, and then I got him to purchase a halter to use at home to stretch his neck; and because of his eye complaints, I also had him see an eye doctor. He didn't find anything within the eye itself which would explain the symptoms.

Q. I believe he saw Dr. Nutting? A. Yes.

Q. I believe he also saw Dr.—

A. Thomas Newman.

Q. Dr. Nutting and Dr. Gump are associates, are they not? A. Yes, that's right.

Q. Now, off and on since the time of the hap-

(Testimony of Lloyd D. Fisher.)

pening of this accident, you have treated him, I assume? When did you last see him, Doctor, for examination and treatment?

A. I last saw him June 14, 1949.

Q. And were there still complaints present?

A. Yes, at that time.

Q. Did you examine him at that time also?

A. Yes, I did.

Q. And will you just tell us as late as June, 1949, what [134] you found and what he complained of?

A. Well, he complained of ringing in his ears all the time, but predominantly at night; said that about once or twice a week he got a throbbing or pulsating feeling in the middle of his neck in the back and that an electric pad on it for about two hours seemed to relieve it, and when he had the heat on there, he could feel the pulse beat in the back of his neck; and that he still had the complaint of the pain across the left temple, running up from the base of the skull around in the left temple; and complained that there was a little lump there in the back and that when he pressed on it, he had a burning sensation and it was sore.

He said that he was still very nervous, particularly when he rode in a car. He also complained of pain in his upper back between his shoulder blades on any sudden or sharp movements and that there was a burning sensation there at times. Also complained of pain lower down in the back, which seemed to come right through the chest and that he

(Testimony of Lloyd D. Fisher.)

gets an occasional pain there like an electric shock.

Q. Did he complain of any trouble with his eyes?

A. Yes, he did. He said that—as he put it—his vision fluctuated. He said that at that day, one day he could read and then the next day maybe he wasn't able to hold it on the print.

Q. Now, what would you attribute that condition to, Doctor? [135]

A. Well, I believe that's due to his neck injury. I have seen it many, many times. The mechanism there, as I picture it, is this: That, as a person reads, they follow the lines from left to right with their neck, principally, and the up and down motions with their eyes. When you have spasm in neck muscles, the muscles tend to prevent free and easy motion of the neck. The eyes try to take over, and those small eye muscles fatigue, very quickly so, and unequally, so that they no longer give you binocular vision, they don't focus the same and then you get the sense of blurring; and when they blur, the water, and of course, the patient thinks that his eyes are bad where, actually, it is not within the eye, it's the extra-ocular mechanism, you see.

Q. Does he complain of loss of sleep at the present time?

A. Yes, he said that in an attempt to get sleep, he will go to bed early and stay late, but that usually about two or three a.m., he tosses and turns and will have to get up and walk for a while and then he can't get back to sleep.

(Testimony of Lloyd D. Fisher.)

Q. Now, did you, upon this last visit, make an examination from an orthopedic standpoint; that is, in addition to his complaints, did you examine him?

A. Yes, that's right, I examined him.

Q. And what did that disclose of interest?

A. He had a great deal of tenderness in the back of his neck still. It was maximum in the mid-cervical region to [136] both sides. In other words, right across the curve of the neck and on both sides of the midline. He had more tenderness on the left than he had on the right.

Q. Do you find spasm there at the present time?

A. Yes, he still had some spasm. It wasn't as marked as at the time of his original injury, but he still had some muscle spasm.

Q. Now, there has been a period of two years and approximately nine months elapse since the date of this injury. You learned, did you not, that this man had been engaged in construction work for a number of years?

A. Yes, I did.

Q. Now, in view of the length of time of your examinations, your treatment and so forth, and his complaints, what is your prognosis as far as this neck condition is concerned, Dr. Fisher?

A. Well, frankly, I think he has a condition that has been chronic for two years. It is a very difficult problem of treatment, and he has had a lot of treatment and some relief, but not complete relief. It might be possible that if he were subjected again to rather intensive treatment, possibly traction in the

(Testimony of Lloyd D. Fisher.)

hospital for a couple of weeks, and injection over the points of maximum tenderness with pricaine that it could be improved some, but I don't think now that the prognosis is very good as to complete recovery. I doubt [137] very much whether he will ever have complete relief, and it will be up and down somewhat. He will have days better and times when it is considerably worse.

Q. Doctor, would you recommend a course of treatment with hospitalization?

A. I think I would. It's gone that long and he still has a great deal of trouble sleeping. Sometimes, generally two to four hours of sleep he will lose for several nights in a row.

The Court: What is the nature of the injury or condition of his neck? You have described what his complaints are, but what is it?

A. It is a cervical strain. It doesn't—the word “strain” doesn't seem to connote very much. He doesn't have a fracture—at least as far as we can determine. He has had a number of X-rays of his neck. But we see that not infrequently. It consists of multiple small tears in the muscular and ligamentous structure about the neck; and of course the neck is one of the most mobile parts of the body. It is always moving and thousands of times a day, and it is almost impossible to keep it entirely still; and if you do immobilize it for a period of several months like we have to do with fractures occasionally, then it is quite stiff and it takes a long time to

(Testimony of Lloyd D. Fisher.)

get it limber again. So long as it is stiff, it still gives a little pain. As I say, I have seen any number [138] of these neck cases and they are really tough to treat, and so many of them go on to have permanent trouble.

Q. What in your opinion Dr. Fisher, would be a reasonable charge for treatment and hospitalization such as you indicate?

A. Well, you can figure about \$100 a week in the hospital.

Q. How much?

A. About \$100 a week for hospitalization, and the other treatment would be probably another \$150, probably—\$350.

Q. Dr. Fisher, in view of his trade, in your opinion, is he disabled at the present time from engaging in the work that he was engaged in at the time of the accident and for a long time prior thereto?

A. Yes, I think he is, for this reason; that he hasn't the endurance. I mean, when you use the shoulder muscles, some of which are derived from the neck, the trapezius and the scapulae, and several other muscles; and when you do work with your arms for a time, then the neck is irritated. You get an increase in the amount of pain. Whereas he probably could do something light, I doubt if he could do the heavy work that he was doing; certainly not for an eight-hour day, day after day.

Q. Now, Dr. Fisher, you spoke of the condition of both knees when you first saw him, and indicated the length of the abrasions and so forth. [139]

(Testimony of Lloyd D. Fisher.)

A. Yes, I did.

Q. He demonstrated here yesterday on his right knee, I believe, what would appear to be a projection or a bump as he bends his knee here on the knee itself. Is that significant?

A. Yes, it is. That as I believe, is the result of the injury he had; that and the laceration, which, as I described it, cut into the periosteum, the bone covering; and when you raise the bone covering and get bleeding underneath, as that heals, it lays down new bone; and I believe that—unfortunately, I haven't X-rayed that knee recently—but a lateral view would probably show that there is a projection of bone there. If it isn't bone, then of course it has to be scar tissue; but whichever it is, it could be cut out, and there is some chance it might recur, but probably you could cut it out and get relief.

Q. Did he complain of pain or inability to kneel on that particular knee?

A. Yes, he did say that, that he couldn't, that he couldn't kneel on it. It doesn't hurt him walking, particularly, but if he goes to kneel, he is kneeling on one spot which is painful.

Q. Now, in your opinion, is that condition permanent?

A. Well, yes. Oh, that won't change unless you change it surgically. [140]

Mr. Richard: Now may I have that typewritten exhibit there?

Q. Dr. Fisher, I believe you made certain

(Testimony of Lloyd D. Fisher.)

charges in connection with this matter of charge of a hundred dollars, and then later on a charge of \$89.50, which I believe brought the matter up to sometime in the early part of this year; and then I believe that there was this last visit in June, and the examination. A. Yes.

Q. And was there an additional charge for that?

A. Yes, there was a \$15 charge for that.

Q. \$15 additional charge for that?

A. Yes.

Q. And you consider those charges reasonable for your services? A. Yes.

Mr. Richard: Is there any question about the reasonableness of his charges on this bill here for Dr. Nutting, Dr. Norcross, Dr. Gump and Dr. Libby?

Mr. Deasy: Well, I don't see any need for calling them in; if the Doctor knows what they did, he can testify.

Mr. Richards: All right. Dr. Norcross was called? A. Yes, sir.

Q. And, in addition to that, Mr. Wibye testified that he made certain visits to Dr. Norcross' office.

A. Yes.

Q. Dr. Norcross here has a charge of \$33.50 for the consultation when he was called in at your instance; and of \$10 for the two visits made to his office. In your opinion, are those reasonable charges?

A. Yes, sir.

Q. There was also a charge by Drs. Nutting and

(Testimony of Lloyd D. Fisher.)

Gump on an eye examination, of \$10; and an additional examination and treatment, of \$15. In your opinion, are those charges reasonable?

A. Yes, sir.

Q. There were certain X-rays, of course. Those X-rays were made at your instance?

A. Yes, sir.

Q. Those X-rays were made by Dr. Hatcheck. There was an X-ray of \$12.50; there is another one here, \$20, for the X-rays taken. In your opinion, were those charges reasonable? A. Yes, sir.

Q. Dr. Libby has a charge, I believe, of \$5.00?

A. Yes.

Q. There is a bill here for the hospitalization for Mr. Harold Wibye, in the amount of \$100.79, and later on, a bill for the second period of hospitalization of \$59.95. In your opinion, are those reasonable? A. Yes, sir. [142]

Q. You prescribed physiotherapy? Physiotherapy was prescribed by you? A. Yes, it was.

Q. And Mr. Wibye has testified, I believe, that he had fifty to fifty-five physiotherapy treatments for charges—a charge here of \$250 which would be approximately \$2.50 per treatment.

A. Yes, that's the standard fee.

Q. Dr. Schock, I believe, assisted you in surgery?

A. That's right.

Q. That was on the same night as the accident, or very shortly thereafter, for which a charge of \$75 was made. A. That is correct.

(Testimony of Lloyd D. Fisher.)

Q. You believe that to be reasonable?

A. Yes. As a matter of fact, he did the repairs on Harold Wibye while I was working on——

Q. You were working on Mr. Nels Wibye at the same time, were you not? A. That's right.

Q. In addition, you learned that Mr. Wibye had gone to Jones and Naffziger's office in connection with the trouble involving his head; and I believe you testified that he was there for a full examination, and then he made one further treatment, and a bill was rendered by Drs. Jones and Naffziger in the amount of \$75. Do you believe that is [143] reasonable?

A. Yes, that's about what it is.

Q. Now, turning to Nels Wbye, did you upon that same evening see Nels Wibye?

A. Yes, I did.

Q. And you examined him at that time?

A. Yes.

Q. Will you tell us just what your examination disclosed?

He had lacerations of his chin and his left axilla—that is the arm pit. Now, his left forearm and left hand, and on his right upper arm, right wrist—the laceration of the wrist had severed three tendons, three extension tendons: That of the upper left arm had partially severed the triceps tendon. That is the muscle that extends the elbow. There were multiple bruises and abrasions. He had marked pain on moving either leg, and there was abnormal mobility of

(Testimony of Lloyd D. Fisher.)

the right leg just below the knee. In other words, you could move it from side to side much more than a normal limb would move. X-rays were taken of these, which revealed a fracture of the left acetabulum. That is the socket of the hip joint, in the left side. The posterior lip was fractured and displaced. There was an intratrochanteric fracture of the right hip. That is a fracture running through the prominence of the hip that you feel under the skin, and it was complete and the fragments were displaced. That is, the leg [144] was riding upward.

There was a comminuted fracture of the right upper tibia—that's the main bone in the lower leg—into the knee joint; spasm, shock. I don't have here just what his pressure was, but we had to treat his shock by giving him several units of blood plasma.

We then took him to surgery and debrided and repaired the various lacerations and the severed tendons and applied dressings; then placed a wire for traction through the right heel bone; and then, with traction on the leg, we applied a long-leg cast, immobilized this fracture below the knee, and then we put him in bed with traction apparatus and put a pole through that to control the fracture of his hip on the right, and also put skin traction on the left side to control the spasm and pain from the left hip fracture.

We also gave him—we put a splint on the right forearm to take the tension away from the repaired

(Testimony of Lloyd D. Fisher.)

tendons. He was also placed on penicillin, a regime of penicillin to ward off infection.

For several days following that, he had a great deal of gastrointestinal disturbance to such an extent that we had to put down a stomach tube, and give him fluid by vein; and we took it out after several days, but he began to vomit again and we had to replace it, but finally overcame that condition.

On November 22, of '46, we did an open reduction of the fracture of the right tibia. That is, we opened it up, put the fragments together and fixed it with several stainless steel screws, and then reapplied a cast.

Two weeks following that, a second operation was performed—this time on the left hip—putting back the posterior lip of the acetabulum which had been displaced and fixing it in position with two screws.

Q. Now, were X-rays taken, Dr. Fisher?

A. Yes, sir.

Q. Particularly of his knee and the hips and these various places. Do you have those X-rays with you? A. Yes.

Q. Those were taken under your direction?

A. Yes, they were.

Q. And do you want to show the X-rays there that would have been significant, showing the various fractures? A. All right, sir.

The Court: Well, he doesn't need to show them as far as I am concerned unless the other side wants to see them. The testimony of the doctor covers it, unless the other side wants to see it.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: No, I don't particularly.

Mr. Richard: I think they should be offered in evidence.

The Court: You may put them in evidence. [146]

Mr. Richard: Do you have those, Doctor?

A. Yes. Do you want just the ones that tell the general story?

Q. I would suggest, yes, because you have lots of X-rays here. There is no use of burdening the record with other than the ones that show the——

The Court: Put in evidence any of the X-rays you wish.

The Witness: (Indicating) This is a film of the right hip, taken December 9, 1946.

Mr. Richard: Just identify them so we will know what they refer to.

The Witness: There is also an anteroposterior view of the pelvis, taken November 11, 1946, showing the fracture of the left acetabulum and the fracture of the right trochanter.

Mr. Richard: We offer those in evidence, if your Honor please.

The Clerk: Do you wish them marked separately or as a group?

The Court: You had better mark them in the order in which he referred to them. The first X-ray that he referred to will be twelve, is it?

The Clerk: Yes.

The Court: And the next one will be thirteen.

(Testimony of Lloyd D. Fisher.)

(The X-rays referred to were admitted in evidence and [147] marked Plaintiff's Exhibits Nos. 12 and 13, respectively.)

Q. (By Mr. Richard): Do you want to use this, Doctor?

A. This is a lateral view of the right hip, showing the fracture of the right trochanter, taken November 13, 1946.

Mr. Richard: We offer that, if your Honor please.

The Clerk: 14.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

The Witness: This is an anteroposterior view of the left knee—the right knee, taken November 8, 1946, the day of the injury, showing a comminuted fracture through the head of the right tibia, with displacement of the fragments.

Mr. Richard: We offer that, if your Honor please.

The Clerk: 15.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 15.)

The Witness: This a lateral view of the right knee, taken February 3, 1947, showing the old fracture of the right tibia which had been fixed with four metallic screws.

Mr. Richard: We offer that, please.

The Clerk: 16.

(Testimony of Lloyd D. Fisher.)

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 16.)

The Witness: This is an anteroposterior view of the—it should be right hip—taken November 8, 1946, showing [148] the intratrochanteric fracture.

Mr. Richard: Next in order.

The Clerk: 17.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 17.)

The Witness: This is an anteroposterior view of the right knee, taken February 3, 1947, showing the old fracture which has been fixed with metallic screws.

Mr. Richard: Next in order.

The Clerk: 18.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

The Witness: This is an anteroposterior view, taken of the left hip, taken February, 1947, showing the acetabular fracture reduced and fixed with two metallic screws.

Mr. Richard: Next in order.

The Clerk: 19.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

The Witness: These films——

Mr. Richard: We will not bother with the films.

(Testimony of Lloyd D. Fisher.)

The Witness: This is the part that we haven't covered yet. It was a later procedure on the right hip.

Mr. Richard: All right.

The Witness: This is an anteroposterior view, the [149] right hip, taken June 7, 1949, which shows the old fracture and osteotomy of the right femur.

Q. (By Mr. Richard): What is osteotomy, Dr. Fisher?

A. Well, that's where you cut the bone. You do it to change the angle. That was the purpose in this case, fixed with a metallic nail and screws.

Q. That was done subsequent to the original operations, was it not?

A. Yes, the original, under traction. He had two fractures in that leg; and under traction, it was at first in good position and gradually lost some position in spite of the traction. It looked as though it might be good, but on actual using, when we got him on his feet, we found that he was quite limited in the abduction. He couldn't bring the leg out, and it gave him a very awkward gait. He couldn't walk well; so we took him back in the hospital and cut the bone through here, changing the angle in relation to (Indicating)——

Q. You indicate you cut the bone through here, and you refer to what?

A. Referring to the subtrochanteric area of the left femur.

Q. That is below the socket?

(Testimony of Lloyd D. Fisher.)

A. Yes, below the socket; yet.

Q. Then, that was fixed with——

A. That was fixed with an angle nail, a Moore—a hip nail.

Q. Which is shown in the X-ray? [150]

A. Yes.

Mr. Richard: We offer this in evidence, your Honor.

The Clerk: 20.

(In evidence as Plaintiff's Exhibit No. 20.)

The Witness: This is a lateral view of the same right hip, the same date as the previous one, that is, June 7, 1949, showing the same fracture and osteotomy with nail and screw fixation from the lateral aspect.

Mr. Richard: We offer that.

The Clerk: 21.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 21.)

Q. (By Mr. Richard): Those are the significant X-rays? A. Yes, sir.

Q. Mr. Wibye testified that he was in Providence Hospital continuously from the date of his admission on November 8th, until, I believe, sometime in March of 1947.

A. Yes; that's right.

Q. And he was under your treatment during that entire time? A. He was.

Q. And then he was readmitted to the hospital at

(Testimony of Lloyd D. Fisher.)

a later date I believe, when this operation took place that you just indicated?

A. Yes, sir.

Q. Is that right? A. Yes, that's right.

Q. And he was in that time a period—does your record show that?

A. Yes, on June 11, 1947, the osteotomy and nailing was performed.

Q. And he was in the hospital for what period of time then?

A. Until the 21st of June, 1947.

Q. Of June, 1947. Now, he has been under your care ever since that time?

A. Yes, he has.

Q. And you last saw him, I believe, sometime in June, did you not? A. Yes, sir.

Q. And at that time, did you examine him?

A. Yes, I did.

Q. What did that examination disclose?

A. That was on June 6 of 1949; and he complained in relation to his right knee, that his motion was still limited, that it aches occasionally just below the knee, and that once or twice a month this pain will become rather severe. Occasionally he complained that all the strength goes out of it—as he put it—so that when he walks, he does so a little guardedly because it has gone out and he is afraid that it might, and he has to watch it.

In relation to the right hip, he complained of aching in the hip at times. [152]

(Testimony of Lloyd D. Fisher.)

Q. Now, before we get to the right hip, you spoke of the limitation in motion in the right knee. What is that and to what extent? That is, what particular motion is involved?

A. Well, I was going to cover that in my examination. I am just covering what he complained of now.

Q. That's right. That is all right.

A. It is the right hip. He complained of it aching at times and stated that when he was in confined quarters, the hip—that when he was confined to his quarters, his hip felt good, but when he went out walking and was in the field, as he put it, that he couldn't seem to handle his leg well, that it tired and he couldn't co-ordinate it as well as the other one.

Q. Did you examine his right hand, Doctor?

A. Yes.

Q. What do you now find?

A. He complained of tenderness which persisted over the dorsal of the hand and said there was a sensitive area there, indicating over the first or fourth metacarpals; and he said that if he bumped anything with it, it gave considerable pain, and that he didn't have as much strength in it as he had before.

The left hand, he complained that the thumb had sort of a numb sensation in it and that he didn't have the grip in it that he should have. He also had a highly sensitive area [153] over the proximal

(Testimony of Lloyd D. Fisher.)

portion of the first—he indicated a place which was the proximal portion of the first metatarsal. It was over here (Indicating); and the left hip, he said that it previously, or about three weeks prior to the time I saw him, he said he had pain in it several times, and that this had occurred after he had done considerable walking.

He complained of his back, stating that it ached almost all the time; that sometimes it was quite bad and then again it would subside, more apt to ache after activity.

Q. What, in your opinion, Doctor, was the cause of the trouble in the back?

A. Well, I think, with his two injuries to the hips, and in addition to a back strain, that that is what is causing his trouble. Mechanically, the instrument is a little different now than it was; and technically, with the limitation of the knee—and I think that those factors probably keep up the irritation the back which was caused by the original injury.

Incidentally, I forgot to mention that he complained of his back when he was in the hospital and afterward, and that we took X-rays of the spine, but which were negative, so I didn't put them in as evidence; and he still has that back pain.

Q. Now, did you examine him from an orthopedic standpoint yourself in June? [154]

A. Yes, sir; I did.

Q. Will you tell us what that disclosed?

(Testimony of Lloyd D. Fisher.)

A. I examined the motion of the knees, comparing the right with the left, and he could extend both knees fully; but on flexing them, he had 125 degrees of flexion on the right, whereas, on the left, he had 152 degrees.

Q. That is bending back?

A. That is bending the knee back. In other words, he lacked 27 degrees of normal motion in the knee; and by measuring the distance of the heel to the buttocks, it gives you a better mental picture of it, I believe.

On the right, the heel would only come within nine and a half inches of the buttocks; and on the left, it came to three and three quarters inches.

He had tenderness posterior to the tibia on the right. In other words, on the lateral side of his knee behind and below the knee joint; and, of course, there were surgical scars there which were only slightly tender. He had a marked contracting of moving the right knee. I measured the circumference of the legs above the knee, at the knee, and below the knee, and, in general the right ones were smaller than the left.

Q. The right was smaller than the left?

A. Yes; 6 inches above the kneecap on the right was $17\frac{7}{8}$ compared with $18\frac{7}{8}$ on the left; in other words, an inch [155] difference, but the knee was a little bigger around because of the damage incurred. It was $16\frac{1}{8}$ at the middle of the kneecap on the right, and $15\frac{7}{8}$ on the left. That's a quarter

(Testimony of Lloyd D. Fisher.)

of an inch difference; and measuring 15 inches below the kneecap, the right was 14 inches; left $13\frac{3}{4}$, only a quarter of an inch difference there. Leg lengths were the same.

Q. Did you find scars on both hips from the surgical operations? A. Yes.

Q. How long, approximately, are they, Doctor?

A. There was an eight inch oblique scar over the left gluteal region; and over the right hip there is a $6\frac{1}{2}$ lateral longitudinal scar over the trochanter. He was tender over this scar in this mid-portion, and he said that's the spot that hurts him. He was unable to squat down without using his hands for support.

Q. That is because of the limited motion in the right knee?

A. Limited motion in the right knee; yes, sir. Measured his hip motions and the right hip motion was not as good as the left. Flexion of the hip—that is bringing it up this way (indicating)—115 on the right as compared to 125 on the left; ten degrees different. Abduction—that is bringing the hip out a way from the body—was the same. Adduction—bring it across the other leg—was 17 on the right [156] and 28 on the left, a difference of 9 degrees. Internal rotation—that is rolling the leg in—was 16 on the right and 37 on the left, a difference of 21 degrees. External rotation was equal.

Extension of the hip—that is bringing it back this way (indicating)—was 10 degrees on the right and

(Testimony of Lloyd D. Fisher.)

16 degrees on the left; and his back—I examined his back and there was tenderness over the spine of the 12th dorsal vertebra, and discomfort on extreme extension, and less discomfort on flexing the back; and on rotating it to the right, he can swing his body around.

The Court: The witness walked very slowly and I asked him what caused that and he said it was because of the knee. What is the reason, if any, for him to walk slowly?

A. Well, there is scarring around the knee. You noticed it's bigger than the other end and, of course, when you have a fracture, you not only damage the bone—that is, the fracture of displacement—you not only damage the bone but you tear the bone covering and some of the ligaments; and particularly in this fracture, he had tear of the knee capsule; and of course you have a scar there and it is like a scar on your hand and it usually has a certain amount of residual stiffness and thickness, and they can do better after they warm it up a bit than when they are sitting and first get up. They are a little slow. [157]

The Court: We will take a brief recess at this time.

(A short recess was taken.)

(Lloyd D. Fisher, being previously duly sworn, resumed the witness stand and testified further as follows:)

(Testimony of Lloyd D. Fisher.)

Direct Examination

(Continued)

By Mr. Richard:

Q. The X-rays that you say you took after the examination which was made on June 6 or 7, of the knee and of both hips, now there are pins or screws in the sides of each of those fractures?

A. Yes, sir.

Q. Do you find any calcification in these later X-rays in the vicinity of those screws or pegs that are of any significance?

A. Well, they are all—the fractures are all healed, of course, with new bone. That is calcification. There is, of course, some alteration of the joint surface of the knee, in spite of the surgery there as compared with normal; and there is calcification about the site of the fractured side of the tibia there which, in itself, doesn't interfere with knee motion, except that it makes the knee a little more bulky and tighter.

Q. Well, Doctor, these pins and screws and so forth, in your opinion, should they remain there permanently?

A. Well, we find that hip pins in a patient very frequently [158] do better when the pin is removed after the bone is well healed. After a patient is reasonably active for a time, they seem to give a certain amount of irritation; and he still complains of some discomfort around the right hip, and I suggested to him that it would be probably helpful to

(Testimony of Lloyd D. Fisher.)

remove the pin in the right hip and nail on the right hip.

Q. That would require an operation?

A. Yes.

Q. And a period of hospitalization for about how long?

A. Well, perhaps four or five days.

Q. And inactivity for any period of time thereafter?

A. Yes, inactivity for the first ten days; and following that he could increase activity. He should be back to where he is now in about six weeks.

Q. What would be a reasonable charge for the hospitalization and operative surgery and care?

A. Well, five days, say, with the cost of surgery and X-ray, that would be \$150; and surgeon's fee, \$75, with the following care. That would be about \$225, I would say.

Q. Now, Dr. Fisher, for your services, there was a bill to Mr. Nels Wibye dated the 9th day of April, in the amount of \$1146.25 and then your total bill at the present time, I believe you told me, would be \$1171, which is twenty-five more than that charge.

A. Correct. [159]

Q. In your opinion——

A. That—of course, there were the X-rays in addition to that. I had forgotten to mention those were taken in my office. There was his hip—both hips and the knee. That's \$33.25 in addition.

Q. In addition?

(Testimony of Lloyd D. Fisher.)

A. Yes; that would make \$1204.25.

Q. \$1204.25? A. Yes.

Q. Now, he was rendered a bill for his entire hospitalization in the amount of \$1716.59. Do you believe that to be a reasonable charge, being the regular rates charged by Providence Hospital?

A. Yes, sir.

Q. He was under the care, was he not, of special nurses for a considerable period of time?

A. Yes, he was at first there for quite a while.

Q. And the charge for nurses was \$900, for special nurses. You believe that to be reasonable?

A. Yes, sir.

Q. Dr. Norcross has made a charge of \$25. In your opinion, is that reasonable? A. Yes, sir.

Q. And Dr. Pecoek, was he associated with you, or what?

A. No, I asked him to see him, I believe, when I was away [160] on a vacation.

Q. That was his testimony. For which he made a charge of \$25? A. Yes, sir.

Q. Which you believe reasonable? A. Yes.

Q. And Dr. Libby—— A. Yes.

Q. (Continuing)——a charge of \$50.00.

A. Yes, sir.

Q. Which you believe reasonable?

A. Yes, he assisted in surgery, I believe.

Q. Correct. And there was a total charge up to the last X-rays—which you say were \$33.50, and \$235 for X-ray pictures——

(Testimony of Lloyd D. Fisher.)

A. Yes, that seems about right.

Q. This vibrator, I believe you said that you did not particularly prescribe that. He purchased a vibrator for massage.

A. I mentioned to him once that it was a good thing to have. I don't remember exactly telling him to buy it.

Q. Now, Dr. Fisher, in your history and discussions with this man, you learned that he had been engaged for a number of years before this accident in construction, particularly heavy construction, did you not? [161]

A. Yes, sir.

Q. In your opinion, what is the prognosis, as far as this man is concerned?

A. Well, I feel that, except for removing the nail, which will give him probably some improvement in his right hip, that his condition is stationary; and as far as occupation goes, I am sure that he will never be able to do heavy construction again. He could, however, I believe, do some lighter type of work but not work requiring a lot of climbing or squatting. He can't squat.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. I think you said, Doctor, that if you decided to remove the nail from the right hip, the total cost of that procedure would be approximately \$225. Wasn't that what you said?

A. Yes; that's right.

(Testimony of Lloyd D. Fisher.)

Q. I think you also stated that there was a necessity for some further surgery upon Mr. Harold Wibye?

A. Yes. I think that would help him.

Q. What was that? I didn't make a note of that.

A. Well, I don't know that we made any statement as to the cost of that.

Q. I understand you said that the hospital would be about \$100, and ——[162]

Mr. Richard: Which one was that?

Mr. Deasy: For Harold Wibye. I got a figure of \$100 for hospital and \$250 for a doctor for some future procedure but I don't know what that procedure was to be.

The Witness: We did mention hospitalization for traction for the two weeks.

The Court: The Doctor said that he recommended his condition might be improved by a further period of traction in the hospital for some period of time.

Q. That's right, isn't it, Doctor? A. Yes.

The Court: He was giving you the costs involved in that.

Mr. Deasy: Yes.

Q. Now, you stated, I believe, in relation to Mr. Harold Wibye, that the X-rays showed the presence of a small metallic body in his jaw. What was that, Doctor?

A. Well, there was some previous injury, a little piece of metal had penetrated into the soft tissue in

(Testimony of Lloyd D. Fisher.)

his jaw and was still there, hadn't give any trouble, and it was never removed, apparently.

Q. As to the present condition of Mr. Harold Wibye, in effect, at the present time, would you describe his condition as being more or less a persistent stiff neck and this bony or whatever kind of lump it is on his knee. [163]

A. No, it isn't. His neck isn't really stiff; it's a very painful neck. It is fairly mobile, however—quite mobile—but it has a smart tenderness. This marked tenderness and the spasm over a long period—sometimes it is more, sometimes it is less—and the same way of the tenderness. It always had tenderness every time I examined him, in the back of his neck; but sometimes it is more acute than others, and there is usually more or less spasm of the muscles; that is, it is stiff, in that he doesn't like to turn it suddenly without guarding, but when you put him through the full range of motion, he has a normal range.

Q. It isn't a question of a loss of motion?

A. It isn't limited motion; it's guarded motion.

Q. Could that condition come from spasm in the neck, come from a general nervousness, from his nervousness or tension?

A. Well, of course, that always adds to it, but where you have a general condition of tension, of course, you are tense all over; but this is tension, spasm, over and above. I mean, you can be tense and yet you can relax enough to make movements and do things and there is no actual spasm in the

(Testimony of Lloyd D. Fisher.)

muscle and nervous tension, but this is an actual nervous spasm.

Q. What do you consider the cause of the muscle spasm? That is a symptom, isn't it?

A. It is a reflex reaction to pain, to discomfort. [164]

The Court: Well, was there any actual injury that you found to the neck?

A. Well, the injury—I mean there is no cut in the neck. He had some abrasions on the head. Of course, he was knocked out. He was actually rendered unconscious; and then he had this severe pain in his neck when I first saw him. He complained of it in his neck and going around the left side of his head to his eye, and going down in his left shoulder. In fact, he thought he might have a fractured collar bone, he had so much pain there. We X-rayed the—or possibly the ribs, and we X-rayed the chest, too.

Q. (By Mr. Deasy): Did you find any injury to the nerves in the neck? A. No.

Q. In the shoulder?

A. No, I thought there might possibly be because he didn't handle his left arm very well. I mean, it hurt him when he did; and he didn't have any grip in it, and that's why I had Dr. Norcross examine him. He is a neurosurgeon. I thought there might be something that he could find, and his word would be better than mine on that score.

The Court: Well, couldn't he engage in reasonable activity in connection with his former occupa-

(Testimony of Lloyd D. Fisher.)

tion, provided he didn't have to do excessive physical activities, lifting heavy things or do a lot of climbing or——

A. Yes, I say he could do light work, but I don't think— [165] the way I—you understand, I am not a construction man, but I mean, if they have got a job to do, they don't show them any favors. They have got to do their jobs. Of course, if he had some special arrangement where he could limit his activity somewhat, there is no doubt in my mind that he could do a certain amount of work; but under a handicap, of course, of this recurrent pain and lack of sleep and that sort of thing——

Q. (By Mr. Deasy): Well, you stated, Doctor, that in your opinion, Mr. Harold Wibye was disabled from doing work that he previously had done. Now, what did you understand the work he previously had done to be?

A. He had been, to my understand, on heavy construction work and heavy machinery in connection with excavations and construction and that sort of thing. It's just my idea.

Q. What did you understand he actually did in connection with those machines?

A. Well, apparently from what I talked to him, he has done a number of jobs in that connection. He has, on occasions, been a foreman, but a type of foreman where they have to get in and show the men how to do the work, and work with them.

Q. Would you say that this injury which he suffered would incapacitate him from being the gen-

(Testimony of Lloyd D. Fisher.)

eral supervisor or superintendent of a construction project? [166]

A. Well, I mean if he could hold down a job as a superintendent; I mean if he could qualify and get someone to give him that sort of a job, I think he could do that.

Q. Assuming that he was mentally, and as far as ability is concerned, qualified to be in charge of a construction project, do you think that he would be disabled from doing that kind of work?

A. He would be doing it under a handicap with respect to the nights he didn't get much sleep. He wouldn't be in as good shape, however, with that handicap.

The Court: That would affect anybody doing any kind of work.

A. That's right, even light work. I mean, where you had to concentrate mentally on any job.

Q. (By Mr. Deasy): Now, as to Mr. Nels Wibye, you stated, in your opinion, he would probably be permanently disabled, did you, from any work requiring him to do any squatting or climbing of ladders and things of that kind?

A. Yes, any heavy work, heavy lifting. I said anything but heavy work, providing he didn't have to do a lot of climbing or squatting.

The Court: He could do ordinary carpentry work?

A. Well, if he had to climb on the scaffolding and framing, it would be rather dangerous; yes.

(Testimony of Lloyd D. Fisher.)

Q. Yes, there would be an instability there. [167]

A. Yes, he wouldn't be sure and he would be liable to fall.

Q. But he could do carpentry work if he could remain within a limited area and not have to do climbing? A. Yes.

Q. He could nail boards on the wall and saw and do a lot of things of that kind?

A. Bench work and cabinet work he could probably do, if he is qualified. I don't know.

Q. (By Mr. Deasy): And would your answer to his future ability to do supervisory work or act as a superintendent or general foreman be the same as your answer was with regard to his brother?

A. Well, I think he could do that work providing—with those exceptions I mentioned; yes.

The Court: Both men appeared to you to be men of rather good intelligence? They speak well?

A. That's right.

Q. And you saw Mr. Nels Wibye take off his shirt. He appears to be a pretty well nourished man.

A. Yes, they are both well built and intelligent, and apparently are industrious.

Q. They haven't been emaciated as a result of these injuries?

A. Nels has lost a lot of weight. He was quite thin at the time he got out of this hospital. [168]

The Court: He is now back to 185 pounds.

The Witness: Yes, he is now back to, I believe, almost to what he weighed before.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: I have no further questions.

Mr. Richard: I have just one question, Doctor.

Redirect Examination

By Mr. Richard:

Q. You spoke of this knob on Harold Wibye's knee. A. Yes, sir.

Q. And while you said you had not X-rayed it, that probably there had been a separation there that had more or less forced that up. Correct?

A. Well, what I mean to say is that the perosteum had probably been stretched, the bone covering; and of course there is always bleeding when you tear under the perosteum; and when that heals, the tissue beneath it will calcify; in other words, he probably has a sterile bone there.

Q. And you testified that it was a permanent condition and would remain such, but could be cut out by operative surgery? A. Yes, sir.

Q. That would cost about how much? First, do you believe, reasonably, that that should be done?

A. If he can get back on the job—that that is a deterrant—I believe he certainly should have it done.

Q. Would you estimate the reasonable cost of the hospitalization and medical care on that? [169]

A. Oh, I would say \$150 probably would cover it.

Q. Would there be incapacity as far as he was concerned?

A. He wouldn't be able to kneel on that for about a month or for six weeks, I would say.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: No further questions.

The Court: That is all.

Mr. Richard: The Doctor may be excused?

Mr. Deasy: Yes.

Mr. Richard: Thank you, Dr. Fisher.

(Witness excused.)

Mr. Richard: Do you have, Mr. Deasy, that itinerary?

Mr. Deasy: I was about to offer that in evidence.

The Court: Did you want to present any more evidence?

Mr. Richard: Just this itinerary that I was going to offer in evidence. That's—let's see, there was a certified copy.

Mr. Deasy: May I offer that, so that when the case is over I will be able to get it back?

Mr. Richard: Well, it doesn't make any difference. I simply want to offer it as a part of my case.

Mr. Deasy: That is all right.

Mr. Richard: But, as far as getting it back——

Mr. Deasy: That is all right.

Mr. Richard: You can substitute a copy for this as far as I am concerned. [170]

Mr. Deasy: Well, that's all right; you go ahead and offer it.

Mr. Richard: All right, we offer this; and if your Honor please, I would like to read it.

The Clerk: Exhibit 22.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 22.)

The Court: You may read it.

Mr. Richard: If your Honor please, this is a copy, certified as a true copy:

"W. W. McCarthy

Major Quartermaster Corps"

a letter on the letterhead of Sorensen Bros—

"Stockton General Depot.

United States Army.

Stockton 1 California

KMDNF QS—1310.1 16 October, 1946.

Subject: Itinerary of Liaison Team

Mr. John Hadley

Stockton QM Liaison Representative

Seattle General Depot

4735 E Marginal Way

Seattle 4 Washington

Enclosed herewith is itinerary for Mr. John Hadley

Zone V, Stockton General Depot for period 1 November [171]

through 30 November.

2. This office should be notified immediately of any necessary changes in this schedule.

For the Quartermaster Supply Officer

(Signed) Robert J. McIntyre, Jr.

Major QMC Director, Stock Control Division."

The enclosure:

“Stockton General Depot, U. S. Army

Stockton 1, California

Office of the Quartermaster Supply Officer

Itineraries for Liaison Teams, Zone 5

Month November, 1946, Date October 16, 1946”

And I desire only to read down to the first eleven days.

“1. (On the first day of November) Travel.

2. Saturday

3. Sunday

4. Stockton General Depot

5. Stockton General Depot

6. Stockton General Depot

7. Travel

8. Travel

9. Saturday

10. Sunday

11 Fort Lewis”

And Fort Lewis also appears on the 12th, 13th, 14th and 15th. [172]

I make the further observation that upon dates which are Saturday and Sunday upon the itinerary, that they are merely marked Saturday and Sunday.

And that is marked:

“A true copy

W. W. McCarthy, Jr.

Major QMC.”

if your Honor please.

Mr. Richard: That is all for the plaintiff, if your Honor please.

(Plaintiff rests.)

Mr. Deasy: We have no additional evidence, your Honor.

(Defendant rests.)

The Court: Now, is there anything—have you any records to show anything about this automobile? Is this an automobile of the Quartermaster's Depot in Stockton, and did it come from Seattle? What do the records show with respect to the matter? I think the Court should have all this information—the factual information concerning the matter. Is there any way of getting that?

Mr. Richard: We have been unable to get anything at all.

Mr. Deasy: Well——

The Court: You could have gotten it. We have all the discovery procedure that is open in the Federal Court, and there is really no reason for the Court having to pry into these things. The interrogatories could have been directed [173] to the government and requests made on all of these matters concerning this car and Mr. Hadley, and all could have been obtained before trial.

Mr. Richard: If your Honor please, I did take that matter into issue, in view of the fact that there is an admission that the automobile was owned by the United States of America.

The Court: It might have effect, the question of whether he was using it in course of his duty. Now, all the itinerary shows is that the man was on travel time. I don't know whether he was traveling in this automobile or not.

Mr. Deasy: I think we could stipulate to that, your Honor.

The Court: These are matters that should be developed. I have got to do a lot of guessing in this case concerning the facts. These are matters that can be easily presented to the Court:

Mr. Deasy: I think we can stipulate, your Honor, that Mr. —

The Court: You shouldn't stipulate to anything unless you know that it is a fact, both representing the government and representing the defendant in the matter. Now, it seems to me that you could easily find out if you don't know already, where this automobile came from, where it was being used and [174] so forth.

Mr. Deasy: Well, my understanding is this, your Honor: That it was a government car, an Army car; that Mr. Hadley operated the car in making these trips, in accordance with this itinerary in connection with his duties as liaison officer; that he was authorized to use the car in accordance with the itinerary.

The Court: In other words, you are satisfied that the Government can stipulate that Hadley left Seattle with this car, which was a government car which he was entitled to use, and that he drove with that car down to Stockton?

Mr. Deasy: Yes, your Honor.

The Court: And that he was going to drive back with it to——

Mr. Richard: Fort Lewis.

The Court: To Fort Lewis?

Mr. Deasy: Fort Lewis, in accordance with this itinerary.

The Court: All right then, that is all right if you make that stipulation on behalf of the Government.

Mr. Deasy: Yes, my understanding is that he was authorized to use the car for the purpose for the number of days covered in this itinerary, in accordance with the itinerary.

The Court: Yes.

Mr. Richard: Now, if your Honor please, as far as I am [175] concerned, I will be very frank about the point raised, your Honor, yesterday. We did make a preliminary study—not specifically that question. We were unable to find any authorities at that time, and I believe that Mr. Deasy is in the same position, and I presume that the Court would like to have authority upon that subject.

The Court: Well, I think the question, Mr. Richard, that you have here—and I am not saying that I haven't any opposing view to the plaintiff in this case—but it is important to cover, to have the question clarified as to whether or not, under the facts as we have them now, the plaintiff—the deceased was acting in the course of his employment at the time. And that will depend on the weight of the testimony—this presumption, if it is applicable—and from that, we will have to decide whether or not this man was acting in the course of his employment at the time.

Mr. Richard: Now, if your Honor please, if I might ask the Court this?

The Court: Yes.

Mr. Richard: Do I understand that the point raised by the Court is that, first, we must determine, we must interpret the Tort Act itself, looked at in the light not particularly of California law, to determine whether or not the Court actually has jurisdiction of this case?

The Court: It might be that; it may be and you might [176] well argue. I am looking at it from your point of view, that there is sufficient evidence without resorting to the presumption.

Mr. Richard: Yes. Of course we do make that claim now of course, but I just wanted to get your Honor——

The Court: But at that time when the matter came up, the question in my mind was the absence of any evidence at all as to what the man was doing with this car at the time, except that there he was and it was a government car, whether or not this presumption, of evidentiary presumption in the California law would be sufficient to make a *prima facie* case.

Mr. Richard: Do I understand your Honor to believe that it might be significant that the statute itself says that the Government is liable if the employee is in the course and scope of his employment, that the fact that it is pointed out in the statute means that he must be in the course of his employment might be significant?

Now, I think that example will show me just exactly where I should go. There is a case in Cali-

ifornia that I referred to yesterday in which the Oxnard Harbor District, a political subdivision, was a defendant, where liability is created, purely statutory under a statute of the State of California. That statute, of course, requires that the employee be in the course and scope of his employment. [177]

Now, does your Honor feel that it might be that because it is the United States Government rather than any other political subdivision that there might be a different rule? In other words, that we would apply a different rule to the United States?

The Court: That——

Mr. Richard: Or the county or any other political division?

The Court: That is purely an academic question. I don't want to have to answer that. You will find that there are a number of decisions already, of course, in the Federal Tort Claims Act, on this question of interpretation. You have got the question of Federal Statutes.

Mr. Richard: Of the Act itself?

The Court: Of the Act of a Federal Statute. You have got the question of how far the rules of evidence of the State would bind, whether or not this is a matter of substantive law.

Mr. Richard: I understand.

The Court: However, that situation may be somewhat changed now by the testimony of the mother of the deceased employee and by this itinerary and by the type of government, so that we really may not need now to resort to the presump-

tion at all. We may now have a situation where here is a man who is driving a government automobile which he was to use on a trip and he finished his work at Stockton and he [178] was going over to have dinner with his mother and then was going to proceed—presumably, according to his attorney—up North; whether or not the accident happening at that time he was in the course of his employment. You have the question of whether, under the facts of the case, there is a case of acting within the course and scope of employment.

Mr. Richard: Should authorities be furnished?

The Court: I think it would be best if you present memorandums in this case.

Mr. Richard: And who shall open?

The Court: I think you should open and discuss the question as to whether or not it was within the course and scope of his employment; then I should like also if you would, to present along with your memorandum, a statement of the amounts, because some of the amounts I have not made notes of, of the complete claim of damages of each one.

I also should like to have your views—aside from the special item of damages—what your view is of the general damage, based upon the evidence presented in this case; and Mr. Deasy can file his memorandum and cover the same matters.

Mr. Deasy: Yes, your Honor.

Mr. Richard: And the time?

The Court: How much time would you want to file your opening memorandum?

Mr. Richard: Fifteen days. [179]

The Court: Fine.

Mr. Deasy: How much to reply? May we have fifteen to reply?

The Court: Fifteen, fifteen and five. [180]

Certificate of Reporter

I, C. E. Moneyhun, Official Reporter Pro Tem, certify that the foregoing transcript of 180 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ C. E. MONEYHUN.

May 19, 1950.

[Endorsed]: Filed May 18, 1950.

[Endorsed]: No. 12537. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Niels K. Wibye, Appellee. United States of America, Appellant, vs. Harold Wibye, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed May 3, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Consolidated Cases No. 12537

UNITED STATES OF AMERICA,

Appellant,

vs.

NIELS K. WIBYE,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

HAROLD WIBYE,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

That the trial Court erred

I.

In finding that John E. Hadley was acting within the course and scope of his employment as an agent, servant or employee of the United States of America at the time and date of the accident.

II.

That John E. Hadley was negligent.

III.

That the evidence of the mother of John E. Hadley was sufficient to establish that John E. Hadley

was on Government business at the time of the accident.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant,
United States of
America.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Causes.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court and to
Messrs. Nichols, Richard & Allard, Attorneys
for Plaintiffs:

The appellant, United States of America, by its attorney herein, hereby designates for inclusion in the transcript of record upon appeal, the complete record, and all the proceedings and evidence in the action.

Dated: May 18th, 1950.

/s/ FRANK J. HENNESSY,
Attorney for Appellant,
United States of
America.

[Endorsed]: Filed May 19, 1950.

No. 12,537

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

VS.

HAROLD WIBYE,
Appellee.

APPELLANT'S OPENING BRIEF.

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

FILED

SEP 21 1950

Subject Index

	Page
Statement of the case	1
Questions of law:	
Does the testimony establish negligence on the part of Hadley?	4
Was Hadley at the time of the accident acting within the course and scope of his employment?.....	6
Conclusion	17

Table of Authorities Cited

Cases	Pages
Adams v. Tuxedo Land Co., 92 Cal. App. 266, 267 Pac. 926	11
Cain v. Marquez, 31 C. (2d) 430	11
Carnes v. Pacific Gas & Electric Co., 21 C. A. (2d) 568, 69 P. (2d) 998	10
Cohen v. Patty, 65 F. (2d) 820	5
Cordoy v. Flaherty, 9 C. (2d) 716	12
Curie v. Nelson Display Co., 19 C. A. (2d) 46, 64 P. (2d) 1158	11
Davis v. Hearst, 160 Cal. 143, 116 Pac. 530.	7
Davis v. Tanner, 88 Cal. App. 67, 262 Pac. 1106.	5
Dennis v. Miller Automobile Company, 73 Cal. App. 293	12
Edwards v. Gullock, 295 Pac. 372	4
Ford v. Carew & English, 89 C. A. (2d) 199	5
Fotopulos, et ux v. U. S., F. (2d), decided March 7, 1950	6
Gordon v. Flaherty (Cal.), 72 P. (2d) 538.	16
Gousee v. Lowe, 41 Cal. App. 715, 183 Pac. 295.	15, 16
Gritsch v. Pickwick, 131 Cal. App. 774, 22 P. (2d) 554.	5
Hartlin v. U. S., Fed. Supp.	11
Helm v. Bagley, 113 Cal. App. 602, 298 Pac. 826.	10
Humphries v. Safeway, 41 P. (2d) 208-210	14, 15
Kish v. California State Automobile Association, 190 Cal. 246, 212 Pac. 27	11, 13
Long v. U. S., 78 Fed. Supp. 35	17
Loper v. Morrison, 23 C. (2d) 600 (1944)	13
Patterson v. Kates, 152 Fed. 481	16
Peccale v. City of Los Angeles, 66 P. (2d) 651 (Cal.)	10
People v. Fitzgerald, 14 C. A. (2d) 180, 58 P. (2d) 718.	8

TABLE OF AUTHORITIES CITED

iii

	Pages
Ryan v. Farrell, 208 Cal. 200 (1929)	12
Rutherford v. U. S., 73 Fed. Supp. 867	16
Setrakian v. I.A.C., 61 Cal. App. 582, 215 Pac. 504.....	8
Texas Co. v. Hood, 161 F. (2d) 618	5
U. S. v. Evelyn Campbell, 172 F. (2d) 500, decided 2/11/48	8
Victor Hubsch v. U. S., 174 F. (2d) 7	8
Westberg v. Wilde, 14 C. (2d) 360	11

Regulations

Army Regulations 850-15, Par. 28	9
--	---

Statutes

California Code of Civil Procedure:	
Section 1850	10
Section 1959	7
Federal Tort Claims Act, Sections 1291, 1346(b), 1402(2), 1504, 2110, 2401(b), 2402, 2411, 2412(c) and 2671-2680..1, 6, 9	
5 U.S.C., Section 78(e) (2)	14

Texts

113 A.L.R. 268	10
2 Cal. Jur. 161-461	5

No. 12,537

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,

VS.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

VS.

HAROLD WIBYE,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

This is a suit under the "Federal Tort Claims Act." Taking the Appellee Harold Wibye's testimony as true, it appears that the facts of this case are as follows (Number in parenthesis refers to Transcript of Record):

The accident happened on State Route 513. This highway runs between the Town of Castro Valley and the Town of Dublin. It is a three-lane highway with

each lane sharply and clearly defined by white lines. Each lane is 11 feet wide (128). At the place of the accident and for approximately 110 yards, the highway is straight. There was no traffic at the time, other than the two vehicles involved in the accident (53).

The accident happened on a clear, dry, bright day, Friday, November 8, 1946, at about 4:45 P. M. For a quarter of a mile prior to the accident appellees had been traveling easterly on the extreme right-hand lane within 6 inches of the right-hand edge of the highway at a speed of approximately 50 miles per hour. Harold Wibye, the driver, first noticed the Government vehicle when it was approximately 120 to 150 feet from him.

The Government car was traveling westerly in its right lane. From the time he first noticed it, it traveled about 35 feet steering slightly to the left until it was about 2 feet in the center lane, then suddenly made (to quote Harold Wibye) "a sharp left-hand turn cutting clear across the center lane and striking the inside of the right front wheel of our automobile * * * he practically cut clear in front of me and hit the right-hand front wheel." (54) * * * (He) "did not apply the brakes very heavily" and there was no swerve to his car (55). Apparently there was no skidding (132).

Officer Schoening of the California Highway Patrol testified Harold Wibye stated to him, "I passed a car somewhere before I started to turn and that's the last

I remember'' (133). Although this is a definite contradiction to Harold Wibye's testimony, yet it appears to be a question of fact for the trial Court to decide and it took the testimony of Harold Wibye as true.

Niels Wibye did not notice the Government vehicle at all. He did not know anything about the actual accident (86-87).

Directing the testimony to the point as to whether or not John Hadley was in the course and scope of his employment, we find——

The Government stipulated that Hadley, the driver of the Government car and who was killed in the accident, was an employee of the United States and that it was a United States vehicle (138-139) but denied he was in the course and scope of his employment.

Plaintiff offered Exhibit No. 22 (202) which purported to be an itinerary of a Liaison Team and particularly of John Hadley.

These were all the facts as to this point on the part of appellees.

The United States called Edna Fipps, who has resided in San Francisco for approximately the past thirty years, and who is the mother of John Hadley (150). She testified that on Thursday, November 7, 1946, her son, John Hadley, telephoned her from Stockton between 3:00 and 4:00 P. M. (150-152) in regard to his having dinner with her about 6:00 P.

M. at her home located at 618 - 17th Avenue, San Francisco, the next day, Friday (154); that Hadley was supposed to have completed his work in time to come to her home in San Francisco for dinner on that Friday (156). He also told her "he was going to cash a check at the Finance Company". (161).

QUESTIONS OF LAW.

The facts present the following questions of law:

(1) Does the testimony of appellees establish a case of negligence on the part of Hadley?

(2) The more important question perhaps is, Was Hadley, *at the time of the accident*, acting within the *course and scope* of his employment?

DOES THE TESTIMONY ESTABLISH NEGLIGENCE ON THE PART OF HADLEY?

Negligence is not presumed. The doctrine of *res ipsa loquitur* does not apply when the accident may have arisen from more than one cause. The character of the accident rather than the facts determine the doctrine of *res ipsa loquitur*.

Edwards v. Gullock, 295 Pac. 372.

Appellees, in addition to proving appellant did some act without which the collision would not have occurred, "must demonstrate that defendant was en-

abled to foresee or know of the danger of his conduct * * *

2 Cal. Jur. Supp. 161-461.

The burden of proof is on the appellees and if two justifiable inferences may be drawn from the facts proved, one for and the other against the appellees, neither is proven and as a matter of law it must be against the party who has the burden of proof—in this case, the appellees.

Texas Co. v. Hood, 161 Fed. (2d) 618.

Presumptions do not arise under the doctrine of *res ipsa loquitur*.

Gritsch v. Pickwick, 131 C.A. 774, 22 Pac. (2d) 554.

“One suddenly stricken by illness which he has no reason to anticipate while driving automobile, which rendered it impossible for him to control the car, was not chargeable with negligence”. (Syllabus).

Cohen v. Patty, 65 F. (2d) 820;

Ford v. Carew & English, 89 C.A. (2d) 199.

“It is presumed that one exercises ordinary care for his own safety. Self preservation is the first law of life”.

Davis v. Tanner, 88 C.A. 67, 262 Pac. 1106.

The evidence shows that on a clear, dry day on a straight, broad highway, Hadley suddenly and sharply swerved clear over into the car of appellees. There could be no testimony as to why he did so as Hadley is dead. No one would deliberately do this. Would

the conclusion be, as a matter of law, that he unavoidably lost control and the accident was unavoidable on his part?

This Court stated in

Diamond Fotopulos, et ux. v. U. S., Fed.
(2d) (decided Mar. 7, 1950)

“The presumption that a person looks out for his own safety, comes to the aid of the plaintiff * * *. This presumption rises to the dignity of evidence when * * * because of death, the plaintiff cannot testify * * *. And it is sufficient to support the * * * findings of a Court *unless overcome by irrefutable evidence.*”

**WAS HADLEY, AT THE TIME OF THE ACCIDENT, ACTING
WITHIN THE COURSE AND SCOPE OF HIS EMPLOY-
MENT?**

We do not believe the facts justify the finding that he was. The mere fact that he was a Government employee and in a Government car, is not sufficient. Obviously Hadley could have been doing a number of things that would constitute being on his own affairs at the time, even if driving a Government car and an employee of the Government. The appellees rely on a presumption that these facts, unless rebutted by appellant, are sufficient; that the law of California applies and the law directs this presumption shall apply.

The Tort Claims Act states, under the heading “*Jurisdiction*”,

“Subject to the provisions of this title * * * the United States District Court * * * shall have exclusive jurisdiction * * * render judgment * * * on account of personal injury * * * caused by the neglect or wrongful act * * * of any employee of the Government *while acting in the scope of his office or employment* (italics ours) under circumstances where the United States, if a private person, would be liable to the claimant * * * in accordance with the law of the place where the act or omission occurred”.

It will be noted that the law specifically makes the United States liable and gives the Court *jurisdiction* only while “acting in the scope of his employment”. Therein it differs with the California law. In this case there is no common law involved. It is purely statutory. The plaintiff can sue only through the permission of the sovereign and only upon the exact terms it permits. The Act makes it mandatory on the appellees to *prove* Hadley was at the time of the impact acting within the scope of his employment. If appellees do not do so, the District Court has *no jurisdiction* to try the case. It is a jurisdiction requisite, a condition *sine qua non*. No presumption can be indulged in because (a) the sovereign requires proof, (b) “a presumption is a deduction which the law *expressly* directs to be made * * *”. (See 1959 C.C.P. of Calif.). Presumptions are wholly creatures of law.

Davis v. Hearst, 160 C. 143, 116 P. 530.

Here the law expressly states and directs that the Court only has jurisdiction if the employee was in

the scope of his employment and then applies the law of the place of the accident. Congress could have simply left out the scope of employment in the Act, if that was its intention.

The Legislature may provide certain things shall be presumptive or *prima facie* evidence.

People v. Fitzgerald, 14 C.A. (2d) 180, 58 P. (2d) 718.

But Congress did not so provide. On the contrary it made it mandatory that it be proven before the Court has jurisdiction. There are no presumptions even in the State of California, except those enumerated in the Code of Civil Procedure of California.

Setrakian v. I.A.C., 61 C.A. 582, 215 Pac. 504.

Nor can a presumption be based upon a presumption. A similar case of this on the facts and law is the case of

Victor Hubsch v. U. S., 174 F. (2d) 7.

We cannot distinguish that case from the present on the law involved. This case is so important that we do not desire to quote part thereof.

Another case is

U. S. v. Evelyn Campbell, 172 F. (2d) 500.

The facts in this case are not as clearly in point as in the *Hubsch* case but the basis for the decision is the same. In this case a United States sailor, while running for a troop train, struck and injured a lady. The plaintiff contended the sailor was acting "in line

of duty", which in the Tort Claims Act is the same as course and scope of employment. The Circuit Court in holding this was not so stated,

"The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states. The very heart and substance of the act is to be found in the words, "scope of his office or employment", not as appellee would read them when wrenched out of their context, but as they are precisely limited in it."

A. R. 850-15, Par. 28, provides the regulations for the use of army vehicles. These have the force of law. Subsection *d* provides,

"Motor vehicles will not be assigned to individuals except to Secretary of War and medical officers on out-patient service. * * *"

Subsection *e* provides:

"Government vehicles will not be used to transport civilian or military personnel between their places of residence and business * * *"

The trial Court, we believe, would have concluded that there was *insufficient* proof that Hadley was acting within the scope and course of his employment, *without* the evidence of the mother; that in the trial

Court's opinion, the evidence of the mother was sufficient to show Hadley was in the course and scope of his employment, although he was making "a slight deviation". The trial Court was inclined to view the mother's testimony as hearsay, but because neither side objected, it assumed it was admissible. Hence it would appear that, as to this, the first question is, Is the testimony of the mother admissible? At the time we offered it, we believed it was admissible, and still do, on the grounds it is part of the *res gestae* (See 1850 Code of Civil Procedure of California). 113 A.L.R. 268 holds the statement by the deceased with reference to the purpose of destination of the journey he was about to make, was admissible. The appellees at the trial also believe it admissible. If not admissible, certainly there is no proof that Hadley was in the course of his employment. Assuming it is admissible, the next question is, Does it suffice to show Hadley was acting in the course and scope of his employment? We say "No", that on the contrary it proves he was not.

It has been uniformly held that the use of an employer's car for the purpose of going to meals, is not within the course and scope of the employee's business, or a "slight deviation".

Carnes v. Pacific Gas & Electric Co., 21 Cal. App. (2d) 568, 69 Pac. (2d) 998;

Peccale v. City of Los Angeles, 66 Pac. (2d) 651 (Cal.);

Helm v. Bagley, 113 Cal. App. 602, 298 Pac. 826;

Adams v. Tuxedo Land Co., 92 C.A. 266, 267 Pac. 926;

Curie v. Nelson Display Co., 19 C.A. (2d) 46, 64 Pac. (2d) 1158;

Hartlin v. U. S., Fed. Supp.;

Kish v. California State Automobile Association, 190 Cal. 246, 212 Pac. 27 (the leading case),

and numerous other cases, some of which are cited hereinafter because of special points.

We believe that the deviation made by the driver of the Army vehicle in returning to Ft. Lewis, Washington, from Lathrop, California, by way of San Francisco, is more than a slight deviation as a matter of law. It will be noted, among other matters herein set forth, that such a deviation would make a trip approximately sixty miles longer than would be traveled if a more direct route were taken.

We appreciate that the law in California indicates that a slight deviation from the strict course of duty does not necessarily take the employee out of the scope of employment if meanwhile his main purpose is still to carry on the business of his master.

Westberg v. Willde, 14 Cal. (2d) 360, and cases cited therein;

Cain v. Marquez, 31 Cal. (2d) 430.

The last cited case decided that in California an employee on his way to lunch, even though driving an

automobile which is the property of his master, is not engaged in furthering any end of the employer and under such circumstances the servant is not acting within the scope of his employment. Furthermore, the case holds that where a servant was proceeding in a direction and on a trip diagonally opposite to that dictated by his master's business, such employee was not within the scope of his employment, even though the trip started and would have terminated in a delivery of the master's property to the master's office.

Furthermore, it is noted that in the cases cited by the Court in his discussion, and included within his opinion, all stand for the proposition that a *slight* deviation by an employee does not exonerate his employer from responsibility to a third party injured by the negligence of the employee. With this proposition and statement we find no fault. However, in almost every one of the cases cited, there is language which indicates that if there was a substantial departure from the normal and direct route by an employee from the shortest return route, or if there is presented by the evidence any element of a junketing or a pleasure trip, a different result would in all probability be reached.

Ryan v. Farrell, 208 Cal. 200 (1929);

Dennis v. Miller Automobile Company, 73 Cal. App. 293,

and cases cited therein. See particularly

Cordoy v. Flaherty, 9 Cal. (2d) 716.

The Court did not refer to the case of

Kish v. California State Automobile Association, supra,

which is the leading case, on the subject under consideration, in California. This case is authority for the statement that an employer is not responsible for the acts of his servant while the latter is pursuing his own ends, even though the act could not have been committed without the facilities afforded to the servant by his relation to the master.

It is believed that the instant case falls within the rule expounded in that case. See

Loper v. Morrison, 23 Cal. (2d) 600 (1944).

In this case at page 605 the Court said

“* * * in deciding the case before us, the results reached in other decisions are helpful but not necessarily controlling * * *. In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another,”

and further states at page 606

“* * * the factors to be considered * * * are the intent of the employee, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties.”

The Court's attention is invited to
 5 *U.S.C.* Section 78(c)(2),
 which reads in part:

“* * * any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant.”

Our argument, therefore, is that when the intent of employee in these cases is considered, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties, particularly when the statute referred to above is considered. The Court of Appeals should decide as a matter of law, that there was such a deviation by the employee in the instant case as to nullify the effects of the California “Permissive use” statute and should rule that the employee at the time of the happening of the accident was not acting within the scope of his employment.

In

Humphries v. Safeway, 41 P. (2d) 208-210,

which likewise held that going to a meal was not in the scope of employment, held further, that if there is insufficient evidence that the employee was on his employer's business at the time of the accident, the question becomes one of law for the Court to decide.

In the *Humphries* case the agent was employed in one city to go to various stores of the employer in that and adjacent cities. During the course of one of his trips from the city where he was employed, Riverside, to the adjacent town in which he was performing his duties, he had an accident and it was claimed that he was acting at the time within the scope of his employment. The Court, in overruling this claim, stated:

“Appellant did not require that he live in Riverside, nor that he travel back and forth *between his home and the place of his work. His place of abode was a matter of his own choosing as was the means of transportation used in going to and from his work.* He could have lived in Fontana or any other place and have taken any available means of transportation he desired to get to and return from his place of employment. *After Bachman's work was done, his employer had no control over him until his duties commenced on the following day.*” (Italics ours.)

In

Gousee v. Lowe, 41 C.A. 715, 183 Pac. 295,

the Court, in denying employee was on his employer's business said:

“Upon an errand of his own the man left the garage and had not returned to within a mile of

it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. * * * This is not the case of a mere slight deviation from the line of duty but a departure for the purposes of the servant."

In the leading case of

Patterson v. Kates, 152 Fed. 481,

(cited in the *Gousee* case), the employee was to take the employer's car from Atlantic City to Philadelphia. His route took him through Northmont and then Gloucester, which towns were a few miles apart. At Gloucester he met a man named Farley, who asked him to take him to Northmont, which he did. On his return to Gloucester enroute to Philadelphia, the accident occurred. The Court held he was not in the scope of his employment.

In

Gordon v. Flaherty (Cal.), 72 Pac. (2d) 538,

the employee was to go to a bank, get change and turn it in at a branch office. At the bank he met a friend who asked him to take her home. *He went to the branch office but instead of stopping there, proceeded beyond. About three blocks beyond the collision occurred.* Held not in scope of employment.

In

Rutherford v. U. S., 73 Fed. Supp. 867,

the Government driver left a radio station where he participated in a recruiting drive. The collision oc-

curred on his way home. The Court held that driving home was not in scope of his employment.

In

Long v. U. S., 78 Fed. Supp. 35,

a Government employee drove a Government car beyond his instructed destination, during which time the collision occurred. Held jurisdictional requirements were not established.

CONCLUSION.

The burden of proof is on appellees to establish the jurisdictional requirements. It would contravene the intention of Congress for this Court to hold that this is established by a stipulation that the vehicle was a Government vehicle and that Hadley had been employed by the Government.

The fact that Hadley was on his way to his mother's home to eat dinner and might stop at a finance company to cash one of his checks does not, likewise, establish the jurisdictional requirements. It was a deviation for his own *purposes*. The Government could not have contemplated that he would do this or even have foreseen it. It will also be noted it was at the close of an Army day, which starts at 7:30 A.M. and ends at 4:00 P.M.; that the accident happened late Friday afternoon, about 4:45 P.M.; that the civilian employees of the Army do not work on Saturday. This may have to come under judicial notice, however it is a commonly known fact. Hadley was not on duty after working hours. The Government could not be held to

have consented to the use of the Government car to go to his mother's for dinner after working hours; on the contrary, there are regulations against it.

Hadley made an engagement for dinner with his mother. The time she expected him was approximately one hour after the accident. The Court can take judicial notice that the site of the accident was, roughly, one hour's normal driving time to San Francisco. It seems apparent that Hadley was going there on his own business. To hold otherwise, would extend the scope of employment far beyond the law of even California, and certainly far beyond the intent of Congress and the decisions of the Federal Court relative thereto.

Dated, San Francisco, California,
September 20, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellant.

No. 12,537

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

HAROLD WIBYE,
Appellee.

BRIEF FOR APPELLEES.

PAUL B. RICHARD,
Central Bank Building, Oakland 12, California,
JOHN D. DEN-DULK,
1440 Broadway, Oakland 12, California,
FRANKLIN C. STARK,
STANLEY E. SPAROWE,
Financial Center Building, Oakland 12, California,
Attorneys for Appellees.

NICHOLS, RICHARD, ALLARD & WILLIAMS,
Central Bank Building, Oakland 12, California,
EUGENE K. STURGIS AND JOHN D. DEN-DULK,
1440 Broadway, Oakland 12, California,
STARK & CHAMPLIN,
Financial Center Building, Oakland 12, California,
Of Counsel.

FILED

OCT 25 195

Subject Index

	Page
Statement of the case	1
Questions presented	4
I.	
There was ample evidence of Hadley's negligence.....	4
II.	
There was substantial evidence that Hadley was acting within the course and scope of his employment at the time of the accident	8
III.	
The Tort Claims Act is to be liberally construed.....	16
IV.	
Appellees are entitled to the inference that Hadley was on the business of appellant from proof that Hadley was in appellant's employ and in possession of an automobile owned by appellant	18
Conclusion	22

Table of Authorities Cited

	Pages
Brown v. Montgomery Ward Co. (1930) 104 C.A. 679, 286 P. 474	13
Bushey v. U. S. (C.A. 2, 1949) 172 F. 2d 447.....	22
Bushnell v. Yoshika Tashiro (1931) 115 C.A. 563, 2 P. 2d 550	19
Cain v. Marquez (1939) 31 C.A. 2d 430, 88 P. 2d 220.....	12
California Casualty Indemnity Exchange v. I. A. C. (1936) 5 C. 2d 185, 53 P. 2d 758	13
Casey v. Casey (1950) 97 A. C. A. 957, 218 P. 2d 842.....	15
Clemens v. U. S. (D. Minn., 1950) 88 Fed. Supp. 971	20
Commissioner v. Stimson Mill Co. (C.C.A. 9, 1943) 137 F. 2d 286	19
Dennis v. Miller Automobile Co. (1925) 73 C.A. 293, 238 P. 739	12
Dept. of Water & Power v. Anderson (C.C.A. 9, 1938) 95 F. 2d 577	19
Employers' Fire Ins. Co. v. U. S. (C.C.A. 9, 1948), 167 F. 2d 655	17
Gordoy v. Flaherty (1937) 9 C. 2d 716, 72 P. 2d 538.....	13
Gousse v. Lowe (1919) 41 C.A. 715, 183 P. 295.....	13
Hamilton v. Pac. Elec. Ry. Co. (1939) 12 C. 2d 598, 86 P. 2d 829	7
Hawthorne v. Eckerson (C.C.A. 2, 1935) 77 F. 2d 844	19
Hubsch v. U. S. (C.A. 5, 1949), 174 F. 2d 7.....	18, 20, 21
Humphry v. Safeway Stores (1935) 4 C.A. 2d 589, 41 P. 2d 208	13
In re Plummer (1947) 79 C.A. 2d 651, 180 P. 2d 771.....	15
J. E. Riley Inv. Co. v. Commissioner (1940) 311 U.S. 55, 61 S. Ct. 95, 85 L. ed. 36	19
Johnson v. U. S. (C.A. 9, 1948) 170 F. 2d 767.....	17
Jolley v. Clemens (1938) 28 C.A. 2d 55, 82 P. 2d 51	5

TABLE OF AUTHORITIES CITED

iii

	Pages
Kishan Singh v. Carr (C.C.A. 9, 1937) 88 F. 2d 672.....	19
Kruse v. White Bros. (1927), 81 C.A. 86, 253 P. 178.....	12, 13
Lawrence v. Goodwill (1919) 44 C.A. 440, 186 P. 781	6
Leenders v. C&H. Sugar Refining Corp. (1943) 59 C.A. 2d 752, 139 P. 2d 987	10
Long v. U. S., 78 Fed. Supp. 35	13
Manney v. Housing Authority (1947) 79 C.A. 2d 453, 180 P. 2d 69	15
Mateas v. Fred Harvey (C.C.A. 9, 1945) 146 F. 2d 989....	11
Megowan v. Los Angeles (1936) 7 C. 2d 80, 59 P. 2d 1012	19
Melville v. State of Maryland (C.C.A. 4, 1946) 155 F. 2d 440	7
Merchants Shippers Assn. v. Kellog Express (1946) 28 C. 2d 594, 170 P. 2d 923	15
Mid-Continent Petroleum Corp. v. Keen (C.C.A. 8, 1946) 157 F. 2d 310	10
Montgomery v. Hutchins (C.C.A. 9, 1941) 118 F. 2d 661..	12, 19
Murphey v. U. S. (N.D. Cal., 1948) 79 Fed. Supp. 925	20
Murphey v. U. S. (C.A. 9, 1950) 179 F. 2d 743	12
Musgrove v. Zobrist (1947) 83 C.A. 2d 101, 187 P. 2d 782	5
Olson v. U. S. (C.A. 8, 1949) 175 F. 2d 510	22
Parker v. Auschwitz (1935) 7 C.A. 2d 693, 47 P. 2d 341..	5
Patterson v. Kates (E.D. Pa., 1907) 152 F. 481.....	13
People v. Alcalde (1944) 24 C. 2d 177, 148 P. 2d 627.....	15
Powers v. Board of Public Works (1932) 216 C. 546, 15 P. 2d 156	15
Railway Express Agency v. Mackay (C.A. 8, 1950) 181 F. 2d 257	23
Ryan v. Farrell (1929) 208 C. 200, 280 P. 945	12, 14
San Diego Gas & Elec. Co. v. U. S. (C.A. 9, 1949), 173 F. 2d 92	21, 22
Shields v. Oxnard Harbor Dist. (1941) 46 C.A. 2d 477, 116 P. 2d 121	19
Shurtleff v. Wynns (1931) 114 C.A. 653, 300 P. 890.....	6
Spelar v. U.S. (C.A. 2, 1948), 171 F. 2d 208, cert. granted, 93 L. ed. 1105	17

	Pages
Temple v. DeMirjian (1942) 51 C.A. 2d 559, 125 P. 2d 544	5
The Joseph B. Thomas (N.D. Cal. 1897) 81 F. 578.....	10
Thomas v. Slavens (C.C.A. 8, 1945) 78 F. 2d 144.....	14
U. S. v. Aetna Cas. & S. Co. (1949) 94 L. ed. 151	17
U. S. v. Eleazer (C.A. 4, 1949) 177 F. 2d 914	22
U. S. v. Fleming (C.C.A. 2, 1943) 134 F. 2d 776.....	15
U. S. v. Fotopulos (C.A. 9, 1950) 180 F. 2d 631 ..5, 7, 9, 17, 21, 22	22
U. S. v. Ingalls (App. D.C., 1940) 114 F. 2d 839	7
Wasserman v. Perugini (C.A. 2, 1949) 173 F. 2d 305	23
Westberg v. Willde (1939) 14 C. 2d 360, 94 P. 2d 59012, 19	12, 19

Codes

California Code of Civil Procedure:

Section 1958	20
Section 1959	20
28 U.S.C.A., Section 1346(b)	5, 21
28 U.S.C.A., Section 2674	21

Texts

1 Wigmore on Evidence (3d ed.) Section 18	15
2 Wigmore on Evidence (3d ed.) Section 285	10
9 Wigmore on Evidence (3d ed.) Section 2510(a)	22
9 Wigmore on Evidence (3d ed.) Section 2510(a), note 2 ..	19

Rules

Federal Rules of Civil Procedure:

Rule 20(d)	5
Rule 52(a)	4

No. 12,537

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	<i>Appellant,</i>
---------------------------	-------------------

vs.

NIELS K. WIBYE,	<i>Appellee.</i>
-----------------	------------------

UNITED STATES OF AMERICA,	<i>Appellant,</i>
---------------------------	-------------------

vs.

HAROLD WIBYE,	<i>Appellee.</i>
---------------	------------------

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellant's Statement of the Case is substantially correct, but it is incomplete, and also incorrect in one important particular referred to below. The trial Judge more fully stated the facts material to the appeal(25)¹ and accordingly, we summarize his statement, making such additions as we believe may be

¹Numbers in parentheses refer to the Transcript of Record.

helpful (indicated by references to the Transcript of Record).

Appellees were seriously and permanently injured when a government car driven by John E. Hadley crashed into the automobile in which they were driving. Hadley was a civilian employee of the Stock Control Division of the United States Quartermaster Corps.

His duties required him to travel up and down the West Coast in a government automobile, visiting various Quartermaster Depots and performing certain work there. His itinerary for November, 1946, the month in which the accident occurred, was introduced in evidence as Plaintiff's Exhibit No. 22 (201-203). It showed that it was Hadley's duty to proceed from Seattle, Washington to the Stockton Quartermaster Depot at Lathrop, California, and to spend several days there. As it turned out, he had to spend two additional days at Lathrop to complete his work (156), at the conclusion of which he was required to drive back to Fort Lewis, Washington, near Seattle. He was scheduled to arrive there on November 11, 1946.

On Thursday, November 7, Hadley telephoned from Lathrop to his mother in San Francisco informing her that he had not been able to finish at Lathrop on Wednesday as planned, but that he would be through on Friday, the eighth, would leave Lathrop on that day, and return to Fort Lewis via San Francisco. He arranged to have dinner with his mother on Friday

in San Francisco, where he also had business with the Finance Office. Appellant refers in its Statement to the "Finance Company", and in its Conclusion treats Hadley's business in San Francisco as being with a private concern, rather than with the Government. Reference to the entire testimony makes it clear that "Finance *Office*" was intended, not "Finance Company." (157-161). The error originated in the question of trial counsel for appellant (161) and should not be perpetuated here.

At about 4:40 p.m. on Friday, November 8, 1946, Hadley was driving on Highway 50 near Dublin, Alameda County, enroute from Lathrop to San Francisco. At that time his car careened onto the wrong side of the road and crashed into the car in which appellees were riding. Hadley was instantly killed, death being caused by shock and hemorrhage due to fractures and internal injuries (140-141). The testimony of Harold Wibye as to the manner in which Hadley swerved across two lanes was corroborated by the investigating officer from the physical facts and the tire and skid marks left by both automobiles (125-132).

It was stipulated that Hadley was an employee of the United States at the time of the accident, that the car he was driving was a United States vehicle, that he was *authorized* to use the car in accordance with his itinerary, and that he was going to drive back with it to Fort Lewis, in accordance with this itinerary (205-206).

It is approximately 900 miles from Lathrop to Fort Lewis and at the time of the accident Hadley had proceeded only a short distance on the long trip. The route through San Francisco, which he elected to take, is approximately 60 miles longer than the inland route from Lathrop through Sacramento to Seattle. No specific travel route was prescribed for Hadley by the government. The route he was pursuing would take him to Fort Lewis without the necessity of retracing any of the distance covered and without the necessity of returning to the inland route (28).

QUESTIONS PRESENTED.

The only issues presented by this appeal are whether the findings that Hadley was negligent and was acting within the course and scope of his employment are clearly erroneous. We believe the mere statement of the case fully demonstrates that they are not, but on the contrary, are clearly correct.

I.

THERE WAS AMPLE EVIDENCE OF HADLEY'S NEGLIGENCE.

The trial Judge found that Hadley was negligent and that his negligence was the proximate cause of appellees' severe injuries (34).

Obviously this finding cannot be set aside unless "clearly erroneous" [F.R.C.P., (Rule 52(a))] and ap-

pellant is required by Rule 20(d) of the Rules of this Court to "state as particularly as may be wherein the findings of fact . . . are alleged to be erroneous."

Appellant has failed to meet the burden placed upon it. The finding of negligence is not only not clearly erroneous but, on the contrary, is amply supported by all of the evidence. That evidence establishes a *prima facie* case of negligence under the law of California, which clearly controls such matters in suits of this kind. [28 U.S.C.A. § 1346(b)].²

It is established beyond question in California that:

"The presence of appellant's car on the wrong side of the highway was in itself *prima facie* evidence of negligence and called for explanation on his part." (*Jolley v. Clemens* (1938) 28 C.A. 2d 55, 68, 82 P. 2d 51.)

Accord:

Temple v. DeMirjian (1942) 51 C.A. 2d 559, 561, 125 P. 2d 544;

Musgrove v. Zobrist (1947) 83 C.A. 2d 101, 103-4, 187 P. 2d 782;

Parker v. Auschwitz (1935) 7 C.A. 2d 693, 696, 47 P. 2d 341;

²The solution to the questions raised by the government's attack on the findings as to negligence are not to be disposed of only by the weight to be accorded findings by Rule 52, "but also on the substantive law of negligence as declared by the statutes and courts of California. Under California law, the question of negligence is, ordinarily, one of fact for the determination of the trier of fact. And this is true whether the inference of negligence is based on conflicting testimony or is derived from undisputed facts from which inferences may be drawn." *U.S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631, 636 (Italics in the original).

Shurtleff v. Wynns (1931) 114 C.A. 653, 655,
300 P. 890.

Such evidence stands as proof of the fact of negligence when unrebutted.

Lawrence v. Goodwill (1919) 44 C.A. 440, 449,
186 P. 781.

Indeed, as established by the above authorities, driving on the wrong side of the road is negligence as a matter of law.

The facts of the present case are even stronger than those of the cases cited. As stated by the trial Judge on appellant's motion for judgment,

"I don't think there is any [substance to] the point that there hasn't been any proof of negligence; that is, a prima facie case of negligence has been made. You wouldn't want any clearer case." (139-140).

This is a clear and accurate statement of the California law. Indeed, we believe it is fair to say that appellant did not seriously argue the issue of negligence in the trial Court (see 139-140). That was the trial Judge's view, for his opinion states that it is undisputed that plaintiff's injuries were caused by Hadley's negligence (26). Appellant has not taken issue with that statement.

In the face of these facts, the settled California law and traditional rules of appellate review, appellant nonetheless treats the question as though it were an original proposition. Its brief speaks of burden

of proof and presumptions and asks "Would the conclusion be, as a matter of law, that he [Hadley] unavoidably lost control and the accident was unavoidable on his part?" (App. Op. Br., pp. 5-6). The trial Court said "No", and we believe we have demonstrated the correctness of that answer. Inferences to be drawn from the evidence are properly left to the trial Court and may not be disturbed on appeal unless wholly unreasonable.

"The sole question for us to determine is whether there was substantial evidence to support the findings in the plaintiff's favor. In answering that question we must take as true all facts which the . . . evidence tends to establish and draw in his favor all inferences fairly deducible from such facts." (Citations)

"Where two different conclusions may reasonably be drawn from uncontroverted evidence, the question as to which should be drawn is for the trial court and not for the appellate tribunal." (Citations) (*U.S. v. Ingalls* (App. D.C., 1940) 114 F. 2d 839, 840, 842.)

Accord:

U. S. v. Fotopulos (C.A. 9, 1950) 180 F. 2d 631;

Melville v. State of Maryland (C.C.A. 4, 1946) 155 F. 2d 440;

Hamilton v. Pac. Elec. Ry. Co. (1939) 12 C. 2d 598, 86 P. 2d 829.

Whether or not Hadley negligently fell asleep at the wheel, leaned over to roll up the right window,

day-dreamed, or had his attention diverted, cannot be known with certainty. Those possibilities, however, are more probable in the ordinary course of human events than that he unavoidably lost control of the car. Under all the facts and circumstances of the case, and in view of the *prima facie* showing of negligence made by the presence of the car on the wrong side of the road, the trial Judge was clearly entitled to determine as a factual matter that the accident was not unavoidable, but the direct result of Hadley's negligence.

II.

THERE WAS SUBSTANTIAL EVIDENCE THAT HADLEY WAS ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

It is appellees' position, and that of the trial Judge, that Hadley was authorized to return to Fort Lewis via San Francisco, and that at the time of the accident he was attending to his employer's business, as well as his own, and thus was within the scope of his employment.

The trial Judge found that Hadley was acting within the course and scope of his employment when he negligently injured appellees (33-34). Thus, appellant is again faced with the task of showing such finding to be clearly erroneous. As held by this Court,

“As the Congress, in waiving this immunity [under the Tort Claims Act], chose to deprive the litigants of the right of trial by jury,

28 USCA § 2402, the findings of a trial judge in a case of this character, take on a greater significance than in an ordinary civil tort action. * * * [Rule 52] requires us to give due weight not only to conclusions drawn by the trier of facts from contradictory testimony, but also to inferences made from testimony which does not stand contradicted directly, but the validity of which is impugned by * * * legitimate inferences from admitted facts (citing cases). * * *

“[T]he trial court having made [inferences], any attempt on the part of the appellate court to ‘draw an inference of fact constitutes a usurpation of the province of the trial court’. And this ‘notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict.’ ” (Citing cases.)

U. S. v. Fotopulos (C.A. 9, 1950), 180 F. 2d 631, 634, 635.

It could not be seriously contended that Hadley would have been beyond the scope of his employment had he planned to dine with a sister directly along the inland route to Fort Lewis. It is thus clear that the basis of appellant's argument is not Hadley's dinner plans, but his choice of routes. Accordingly, the many cases cited by appellant for the rule that an employee may not use his employer's car to go to meals are not in point (App. Op. Br., pp. 10-11). And the trier of fact found that Hadley had authority to choose between the two main routes of return (28). Appellant does not show wherein this finding was erroneous.

Appellant's argument seems to be based on the assumption that Hadley was *prohibited* from returning to Fort Lewis via San Francisco. Yet, all instructions which may have been given Hadley by his superiors were peculiarly within appellant's knowledge. From appellant's failure to produce any evidence concerning them, it may properly be inferred that such evidence would have been unfavorable to appellant [*Mid-Continent Petroleum Corp. v. Keen* (C.C.A. 8, 1946) 157 F. 2d 310, 315; *The Joseph B. Thomas* (N.D. Cal. 1897) 81 F. 578, 583, discussing cases; *Leenders v. C.&H. Sugar Refining Corp.* (1943) 59 C.A. 2d 752, 139 P. 2d 987; 2 Wigmore on Evidence (3d ed.) § 285], i.e., that Hadley was not prohibited from returning via San Francisco, or was specifically authorized to do so, or, what is the same thing, that nothing was said, leaving the choice of routes to his discretion.³

At all events, the trial Court concluded from the evidence introduced by appellees that "no specific travel route was prescribed by the government for Hadley to follow. It is evident from the nature of the itinerary that the choice of routes was his

³Appellant's quotations from various Army regulations and statutes (App. Op. Br., pp. 9, 14) do not substitute for evidence of the instructions given Hadley, evidence which was within appellant's power to produce. Such regulations are irrelevant to Hadley's *authority* to return via San Francisco. Moreover, they tend rather to establish that Hadley was on official business, for it is to be presumed that he was free from wrongdoing.

own.” (28)⁴ On the basis of this evidence, the case is just the same as though Hadley’s superiors had specifically directed him to return via San Francisco. It can make no difference that Hadley was traveling on Highway 50 by *authorized choice* rather than by specific direction. Thus, his intention to eat dinner with his mother is immaterial. Yet, appellant did not in the trial Court, and does not even now, attempt to overcome this evidence and the inferences drawn therefrom by the trial Judge. Appellant merely speaks of 60 miles as being “more than a slight deviation as a matter of law.” (App. Op. Br., p. 11)⁵ In the light of the above evidence, there *was* no “deviation” by Hadley, slight or otherwise.

Further, the trial Judge stated that “the fair and just conclusion [from all the evidence] is that, after leaving Lathrop, Hadley was simultaneously upon the government’s business and satisfying his own desire to visit his mother in San Francisco on the way.” (28-29)

⁴This judicial comment is in effect a finding [cf. *Mateas v. Fred Harvey* (C.C.A. 9, 1945), 146 F. 2d 989, 993] and, of course, is in part the basis for the findings made by the trial Judge. Findings may be included in the opinion (Rule 52, as amended in 1947).

⁵In its Conclusion, appellant for the first time suggests that Hadley was off duty at the time of the accident. It claims that this Court can take judicial notice that an “Army day” ends at 4:00 p.m. Even if true, it is immaterial. It does not establish that *Hadley’s* day ended at 4:00 p.m., particularly when he was traveling from one station to another, as shown by his itinerary. And even if he were “off duty” he was traveling for his employer’s benefit. Second, we deny that an “Army day” ends at 4:00 at all establishments. There are Army offices which work 8:00 a.m. to 5:00 p.m. Third, we dispute that any so-called “Army day” is a proper subject for judicial notice.

The law applicable to such facts is clearly established in California, and elsewhere, to be that

“[W]here the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.” *Ryan v. Farrell* (1929) 208 C. 200, 204, 280 P. 945 (and cases cited).

Accord:

Westberg v. Willde (1939) 14 C. 2d 360, 372-374, 94 P. 2d 590;

Cain v. Marquez (1939) 31 C.A. 2d 430, 88 P. 2d 220;

Kruse v. White Bros. (1927) 81 C.A. 86, 253 P. 178;

Dennis v. Miller Automobile Co. (1925) 73 C.A. 293, 238 P. 739;

Montgomery v. Hutchins (C.C.A. 9, 1941) 118 F. 2d 661.

This rule was quoted with approval and applied by this Court to a suit under the Tort Claims Act in *Murphey v. U. S.* (C.A. 9, 1950) 179 F. 2d 743, 746.

The authorities cited and discussed by appellant establish no rule contrary to the *Ryan* case, *supra*, and are easily distinguished on their facts from the case here presented. Appellant's authorities (App. Op. Br., pp. 6-17) involved situations where the em-

ployee was retracing his steps for personal purposes (*Patterson v. Kates* (E.D. Pa., 1907) 152 F. 481) or was driving in a direction opposite from that which would serve his employer's purpose (*Long v. U. S.*, 78 Fed. Supp. 35); or had continued beyond the end of his employer's journey (*Gordoy v. Flaherty* (1937) 9 C. 2d 716, 72 P. 2d 538; cf. *Kruse v. White Bros.* (1927) 81 C.A. 86, 253 P. 178).

Other cases relied upon by appellant are clear cases of deviation from the employer's business (e.g., *Gousse v. Lowe* (1919) 41 C.A. 715, 183 P. 295) or relate to the "going-and-coming-rule" (e.g., *Humphry v. Safeway Stores* (1935) 4 C.A. 2d 589, 41 P. 2d 208) or are cases involving a particular business errand.

Appellant fails to recognize that Hadley was assigned duties which called for traveling over an extensive area, and thus may be considered a "traveling employee", or one with a "roving commission", so that he was within the course and scope of his employment from the time he left one Army base until he arrived at another. See *California Casualty Indemnity Exchange v. I. A. C.* (1936) 5 C. 2d 185, 53 P. 2d 758; *Brown v. Montgomery Ward Co.* (1930) 104 C.A. 679, 286 P. 474, distinguished on these grounds by the *Humphry* case on which appellant relies.

It has thus been shown that there was no "deviation" by Hadley from the course and scope of his employment. He was traveling from one duty station to another by an authorized route, one of the two

main highways to his destination. But even if there were a "deviation", it would at most be a "slight" deviation, insufficient to take him beyond the scope of his employment. Such a question, and the question as to whether he combined personal business with that of his employer under the rule of the *Ryan* case, were questions peculiarly for the trier of fact. [*Thomas v. Slavens* (C.C.A. 8, 1945) 78 F. 2d 144, 147 (collecting many cases)]. These have been resolved against appellant on the basis of ample evidence.

Quite apart from the foregoing, there was evidence to justify the conclusion that Hadley had business in San Francisco to transact with the Finance Office, and on this ground alone was within the course and scope of his employment at the time of the accident. (157-161).

We believe the foregoing to be a complete answer to this aspect of the appeal. It may be helpful, however, to clarify several points appearing in appellant's brief in order that the issue involved not be obscured.

First, the trial Judge did not rely upon any inference (or presumption, as appellant calls it) arising from proof of car ownership and employment at the time of the accident. On the contrary, he expressly declined to decide whether the inference permitted by California law should be drawn in cases of this kind. Other admissible evidence satisfied the Judge that liability existed (26-27). Accordingly, appellant's attempts (App. Op. Br., pp. 6-9) to deny

the permissibility of such an inference cannot establish error in an opinion which expressly refused so to decide.

Second, the trial Judge did not, as stated by appellant (App. Op. Br. p. 10) *assume* that the testimony of Hadley's mother was admissible on the ground that, although hearsay, neither side objected. On the contrary, the opinion clearly states that "we have conducted independent research and are satisfied that the telephone conversation is admissible" because it falls within the "state of mind exception" to the hearsay rule (27). See *Casey v. Casey* (1950) 97 A. C. A. 957, 963, 218 P. 2d 842; *People v. Alcalde* (1944) 24 C. 2d 177, 185 et seq., 148 P. 2d 627. Even if the testimony were inadmissible hearsay, appellant, having offered it and having interposed no motion to strike or objection to appellee's questions, has long since waived any and all objection to the testimony.⁶

We challenge appellant's further statement that without the testimony of Hadley's mother there was no proof that Hadley was in the course and scope of his employment. Hadley's itinerary was in evidence (25, 201-203) and was relied upon by the Court. Appellant did not object to its admission and, in fact, its counsel intended to offer it himself. It was ad-

⁶*U.S. v. Fleming* (C.C.A. 2d, 1943), 134 F. 2d 776, 778; 1 Wigmore on Evidence (3d ed.), § 18. Hearsay may be considered on appeal in support of the trial Court's findings (*Merchants Shippers Assn. v. Kellog Express* (1946), 28 C. 2d 594, 599, 170 P. 2d 923), and is sufficient to support a finding (*Powers v. Board of Public Works* (1932), 216 C. 546, 552, 15 P. 2d 156; *Manney v. Housing Authority* (1947), 79 C.A. 2d 453, 466, 180 P. 2d 69; *In re Plummer* (1947), 79 C.A. 2d 651, 180 P. 2d 771).

mitted by appellant that the automobile was government owned and that Hadley was in its employ at the time of the accident; it was stipulated that he was authorized to use the car *in accordance with the itinerary*, that he left Seattle with the car, drove it to Stockton, and that he was going to drive it back to Fort Lewis, in accordance with the itinerary (204-206).

Third, there is no question in this case as to the application or non-application of California's "Permissive use" statute, to which appellant refers. (App. Op. Br., p. 14.) No California statute has been relied upon by appellees or the trial Court and none has been an issue in this litigation.⁷

III.

THE TORT CLAIMS ACT IS TO BE LIBERALLY CONSTRUED.

Appellant in effect argues for a strict construction of the Tort Claims Act, pointing out its purely statutory character and the right of the plaintiff to sue only by permission of the sovereign.

The Supreme Court of the United States has held, contrary to this argument, that the statute is to be liberally, rather than strictly, construed:

⁷We suppose appellant has reference to the inference previously discussed (which the trial Court did not pass upon), but such is wholly unrelated to any "Permissive Use" statute. Under such a statute, scope of employment is irrelevant, whereas the inference permitted in California is merely a logical conclusion aiding plaintiff in establishing scope of employment where such is involved, as here.

“ ‘The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.’ ” *U. S. v. Actna Cas. & S. Co.* (1949), 94 L. ed. 151.

It has also been held that “ ‘When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy established by the Act should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself.’ ” *Spelar v. U. S.* (C.A. 2, 1948), 171 F. 2d 208, 209, cert. granted, 93 L. ed. 1105. Accord: *U. S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631; *Johnson v. U. S.* (C.A. 9, 1948), 170 F. 2d 767; *Employers’ Fire Ins. Co. v. U. S.* (C.C.A. 9, 1948), 167 F. 2d 655.

Interspersed in appellant’s argument are repeated references to “jurisdiction.” “Jurisdiction” and “liability” are coextensive in suits under the Tort Claims Act and nothing is added by talking in terms of “jurisdiction.” Appellant is not liable unless the tortious act was done within the course and scope of Hadley’s employment, but obviously the trial Court had jurisdiction to decide whether or not it had jurisdiction. [*Stoll v. Gottlieb* (1938), 305 U.S. 165, 171; cf. *U. S. v. Shipp* (1906), 203 U.S. 563]. If the injury was negligently caused within the scope of employment, there is both liability and jurisdiction; if not, it is for most purposes academic whether it is held that there is no jurisdiction, or only that there

is no liability, or both. On the same reasoning which appellant apparently adopts, it could be argued that a Court has no jurisdiction if there is no *negligence*. Clearly, however, negligence is to be tested by the law of the place of injury and not by any federal rule. Thus appellant's attempts to treat this case as raising a jurisdictional question add nothing in the final analysis.

IV.

APPELLEES ARE ENTITLED TO THE INFERENCE THAT HADLEY WAS ON THE BUSINESS OF APPELLANT FROM PROOF THAT HADLEY WAS IN APPELLANT'S EMPLOY AND IN POSSESSION OF AN AUTOMOBILE OWNED BY APPELLANT.

As previously indicated (*supra*, pp. 14-15), the trial Court did not pass upon the question whether the proof that Hadley was in appellant's employ and in possession of an automobile owned by appellant, gave rise to an inference under the Tort Claims Act that Hadley was acting within the scope of his employment by the United States at the time of the accident. Rather, the trial Court passed this question inasmuch as "other admissible evidence establishes liability." (26-27).

For like reason, it is unnecessary for this Court to decide this question in disposing of the present appeal.

Appellant, however, has chosen to argue the question here, citing *Hubsch v. U. S.* (C.A. 5, 1949), 174 F. 2d 7 (App. Op. Br., pp. 6-9). We are accordingly answering the argument, and will demonstrate that it is manifestly unsound. This Court is, of course, free

to affirm the trial Court upon grounds in addition to those relied upon below.

Commissioner v. Stimson Mill Co. (C.C.A. 9, 1943) 137 F. 2d 286;

Kishan Singh v. Carr (C.C.A. 9, 1937) 88 F. 2d 672;

cf. *J. E. Riley Inv. Co. v. Commissioner* (1940) 311 U.S. 55, 61 S. Ct. 95, 85 L. ed. 36.

As stated by the trial Court, under California law, proof that a car is owned by an employer and that it was in the possession of one who was an employee at the time of an accident, gives rise to an *inference*, and amounts to *prima facie* proof, that the employee was acting within the scope of his employment at the time of the accident. *Westberg v. Willde* (1939) 14 C. 2d 360, 371, 94 P. 2d 590; *Megowan v. Los Angeles* (1936) 7 C. 2d 80, 83, 59 P. 2d 1012; *Shields v. Oxnard Harbor Dist.* (1941) 46 C. A. 2d 477, 487, 116 P. 2d 121; *Bushnell v. Yoshika Tashiro* (1931) 115 C. A. 563, 2 P. 2d 550; And see *Montgomery v. Hutchins* (C.C.A. 9, 1941), 118 F. 2d 661, 664 et seq.; *Dept. of Water & Power v. Anderson* (C.C.A. 9, 1938) 95 F. 2d 577, 583-584, collecting cases. This is also the rule in a majority of other jurisdictions. 9 Wigmore on Evidence (3d ed.) § 2510(a), n. 2.

As held in *Hawthorne v. Eckerson* (C.C.A. 2d 1935) 77 F. 2d 844, 846:

“[I]t seems clear that, where the car is shown to belong to the defendant and the driver to be a person accustomed to drive it on the defendant’s business, there is enough to require the latter to meet the natural inference that at the time of the accident the driver was acting as agent—in other words, in the usual way.”

The rule as followed in California has also been held to apply to suits under the Tort Claims Act. *Murphey v. U.S.* (N.D. Cal., 1948) 79 Fed. Supp. 925, rev'd on other grounds, 179 F. 2d 743. See *Clemens v. U.S.* (D. Minn., 1950) 88 Fed. Supp. 971.

The case of *Hubsch v. U. S.*, supra, relied upon by appellant, involved a Florida rule which in its fullest application would require a holding of liability even though the employee were admittedly outside the course and scope of his employment. Such would be in direct conflict with the Tort Claims Act which establishes liability only for acts within the course and scope of employment. The California rule, on the other hand, is merely an aid to the determination of the factual question to be resolved, i.e., course and scope of employment. As such, it is in no way in conflict with, but is fully consistent with, the federal act.

Moreover, the Florida rule discussed in the *Hubsch* case involved a *presumption* whereas the California rule here involved, relates only an *inference*. "A presumption is a deduction which the law *expressly directs* to be made from particular facts" (Cal. Code Civ. Proc. § 1959). An inference, on the other hand, is but "a deduction which the reason of the [trier of fact] makes from the facts proved, *without an express direction* of law to that effect" (Cal. Code Civ. Proc. § 1958).

In addition, any bearing the *Hubsch* decision might have had on the present case was destroyed by the grant of certiorari by the Supreme Court of the United States on October 20, 1949 (94 L. ed. 37)

which, if not a showing that the decision below was wrong (compare a denial of certiorari) at least indicated that the Court considered the question important enough to be reviewed by that high tribunal. After the grant of certiorari the parties negotiated a settlement and the Supreme Court therefore returned the case to the district court without argument, to consider the proposed settlement (94 L. ed. 195).

The inference referred to is permitted by the wording of the Tort Claims Act itself. By its terms it imposes liability on the government under the doctrine of *respondeat superior* "in accordance with the law of the place where the act or omission occurred" and "under circumstances where the United States, if a private person, would be liable" in accordance with the local law. 28 U.S.C.A. §§ 1346(b). It further provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances" 28 U.S.C.A. § 2674.

This Court has decided that inferences drawn under California law must be drawn in suits under this Act. *U. S. v. Fotopolus*, supra [See also *San Diego Gas & Elec. Co. v. U. S.* (C.A. 9, 1949) 173 F. 2d 92, 94, applying the inference of California's rule of *res ipsa loquitur* to a suit under this Act.]

If California law does not control, it is fair to ask, what law does? As between the local law and a "federal common law", we think the statute gives local law

the edge.⁸ But, if it is to be a "federal common law", then there is no reason why the federal courts should not adopt the California rule as its own, which, we have shown, is the rule of a majority of jurisdictions. The rule is, after all, merely based upon logic and experience, and fairness to injured parties. (See 9 Wigmore (3d ed.) § 2510a). It is productive of just results. In the present case, for example, appellant was possessed of all the facilities necessary to obtain the maximum amount of information bearing upon Hadley's instructions and authority. Appellees were hardly in an equal position, despite modern discovery procedures. Accordingly, the law recognizes that plaintiffs may prove a *prima facie* case by this inference; if the inference is contrary to the actual fact, appellant has ample opportunity to rebut it, as well as ample facilities for obtaining the facts necessary to do so.

CONCLUSION.

On this, as on any other appeal, the evidence must be viewed in the light most favorable to appellees as prevailing parties below. The facts having been found in their favor, the appellate court "must accept as true all facts which the evidence reasonably tended to prove and plaintiff is entitled to all favorable

⁸The law of the state of the injury has been held to control in a variety of applications as to the liability of the master for the negligence of the servant. *U.S. v. Eleazer* (C.A. 4, 1949), 177 F. 2d 914, 917; *Olson v. U.S.* (C.A. 8, 1949), 175 F. 2d 510, 512; *Bushey v. U.S.* (C.A. 2, 1949), 172 F. 2d 447, 448 (requiring plaintiff in a Tort Claims case to prove freedom from contributory negligence when such is the state law); *San Diego Gas & Elec. Co. v. U.S.* (C.A. 9, 1949), 173 F. 2d 92, 94 (applying California rule of *res ipsa loquitur*); *U.S. v. Fotopulos* (C.A. 9, 1950), 180 F. 2d 631 (applying inferences drawn under California law).

inferences which may reasonably be drawn from the evidence and circumstances proven." *Railway Express Agency v. Mackay* (C.A. 8, 1950) 181 F. 2d 257, 259.

Appellant has wholly failed to show that the trial Court's findings are clearly erroneous, or even erroneous. Not being clearly erroneous, they are conclusive [*Wasserman v. Perugini* (C.A. 2, 1949) 173 F. 2d 305, 306]. Nor has appellant shown any error of law. The case remains what it has always been, a simple tort suit in which the trial Judge, upon ample evidence, found that appellant's employee negligently injured appellees while acting in the course and scope of his employment. There was no error in that decision.

Dated, Oakland, California,
October 20, 1950.

Respectfully submitted,

PAUL B. RICHARD,

JOHN D. DEN-DULK,

FRANKLIN C. STARK,

STANLEY E. SPARROWE,

Attorneys for Appellees.

NICHOLS, RICHARD, ALLARD & WILLIAMS,
EUGENE K. STURGIS AND JOHN D. DEN-DULK,
STARK & CHAMPLIN,
Of Counsel.

No. 12,537

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	<i>Appellant,</i>
VS.	
NIELS K. WIBYE,	<i>Appellee.</i>

UNITED STATES OF AMERICA,	<i>Appellant,</i>
VS.	
HAROLD WIBYE,	<i>Appellee.</i>

APPELLANT'S REPLY BRIEF.

FRANK J. HENNESSY,
United States Attorney,
RUDOLPH J. SCHOLZ,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

FILED
OCT 19 1950

Subject Index

	Page
Appellees' statement of the case	1
Was Hadley acting within the course and scope of his employment?	3
Discretionary	10
Appellees' statement that they are entitled to inference that Hadley was on business of employer	12

Table of Authorities Cited

Cases	Pages
Bayless v. Mull, 50 C.A. (2d) 66, 122 P. (2d) 608	6
Cropper v. United States, 81 F.S. 81	12
di Rebaylio v. Herndon, 6 C.A. (2d) 567, 44 Pac. (2d) 581	13
Denny v. U. S., 171 Fed. (2d) 365	10
Glough v. Allen, 115 C.A. 330, 1 Pac. (2d) 545	13
Gratiot v. U. S., 45 U.S. 80	5
Griggs v. U. S., 178 F. (2d) 1	10
Hendrick v. U. S., 82 F.S. 430	10
Hironimus v. Durant, 168 F. (2d) 288	5
Kruse v. White (Cal.), 253 Pac. 178	6
Mauchle v. P.P.I.E., 37 C. A. 719, 174 Pac. 400	13
Sickman v. U. S., decided by 7 C. Ct. 10-24-50	10
Spelar v. U. S., 171 F. (2d) 208	11
Thomas v. U. S., 81 F. Sup. 881	10
U. S. v. Sherwood, 312 U.S. 584, 590	12
U. S. v. Spelar, 93 L. Ed. 1105	11

Regulations

Army Regulations 850-15	4
-------------------------------	---

No. 12,537

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	

NIELS K. WIBYE,	} <i>Appellee.</i>

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
vs.	

HAROLD WIBYE,	} <i>Appellee.</i>

APPELLANT'S REPLY BRIEF.

APPELLEES' STATEMENT OF THE CASE.

We believe that appellees' statement of the case can be distinguished, among the material parts, by the following:

1. The direct route from Lathrop (near Stockton) to Fort Lewis (near Tacoma) is not through San Francisco. As appellees admitted, it is approximately sixty miles longer. The direct route is Stockton, Sac-

ramento, Redding over Highway 99. Appellee states (p. 4): "The route he (Hadley) was pursuing would take him to Fort Lewis * * *". We doubt this. The route he was taking would take him to San Francisco, and if still pursued, into the Pacific Ocean. We do not know where he was going after dinner with his mother in San Francisco. We do know he was supposed to go from Stockton to Fort Lewis. Therefore it must appear that Hadley was going out of his way to have dinner with his mother, a natural desire on the part of a son, but which would retrace his route, in that he would go to Sacramento, if he took the best, shortest and most practical route. It would have given him more time if he needed sleep as indicated by appellees in their brief, if he had eliminated San Francisco.

2. Appellees stress (p. 3) that Hadley was on business in San Francisco besides having dinner with his mother and state the entire testimony shows that Hadley was going to the "Finance Office" not "Finance Company". This seems to us relatively unimportant, for although it appears the words "Finance Office" and "Finance Company" were used interchangeably by his mother, there is no doubt he was going to either one or the other to cash his own personal check, and hence on his own business and not that of the Government. This is the uncontradicted testimony. (R.T. 161.) We quote:

"Q. Did your son say that he was going to cash a check at the Finance Company?

A. He did.

Q. (by appellees' attorney). Well now in your last answer you said something about picking up a check.

A. Well he didn't say anything about picking up a check. He did say something about cashing a check though."

It does not seem necessary to point out that Hadley would not have to cash his check on Government business nor go sixty miles away from a U.S. depot to do so.

(3) Relative to the Government stipulation referred to in appellees' brief (p. 3), the stipulation was as follows (R.T. 205):

"Court. You are satisfied that the Government can stipulate that Hadley left Seattle with this car, which was a Government car which he was entitled to use, and he drove with that car down to Stockton * * * and he was going to drive back with it to——

Mr. Richard. '*Fort Lewis*' * * *

Mr. Deasy. Fort Lewis in *accordance* with his itinerary.'" (*Italics ours.*)

WAS HADLEY ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT?

Appellees say it was their and the trial Court's position that Hadley was authorized to go to San Francisco and at the time of the accident was on Government business; that appellant's position is that because of Hadley's choice of routes it was not in the

course and scope of his employment. We prefer our own brief statement of our position, to-wit: That Hadley was not in the course (digression of sixty miles, etc.), nor in the scope (going to dinner with his mother, etc.) of his employment.

Appellees then state (pp. 10-22) that the Government's failure to produce instruction to Hadley may properly be inferred as unfavorable. In the first place we produced his instruction to go from Stockton General Depot to Fort Lewis. It did not say direct, because that is certainly an implied instruction in the Army. You do not send a battalion to fight North Koreans via New York. The Court will take judicial knowledge that all Army personnel (civilian or troop) are supposed to comply with its regulations and its use of words. Secondly, we know of no other instructions or that any other instructions were necessary.

Army Regulations 850-15 state:

“(c) Motor Vehicles will be used *only for official business * * **”.

“(d) Government owned or Government leased motor vehicles will not be used to transport civilian or military personnel between their places of residence and business except on emergencies or in the following cases * * *. (3) military or civil personnel engaged in field work, the character of whose duties makes such transportation necessary and then *only* in such cases as are approved by the Secretary of War.” (Italics ours.)

Appellees could have easily ascertained if Hadley was given permission to visit San Francisco. Perhaps they did and found out it was adverse, or perhaps they were afraid to try, however be it as it may, we know of nothing except the direct instruction for Hadley to go from Stockton to Fort Lewis. We prefer the record to unknown conjectures and the record shows Hadley was furthering his own business or pleasure at the time of the accident, unknown to his employer. There is nothing in the record to show otherwise.

It certainly cannot be contended that the Army approved Hadley's going to San Francisco on his own business nor was it approved by the Secretary of War. Army Regulations have the same force and effect as law.

Hironimus v. Durant, 168 F. (2d) 288;

Gratiot v. U. S., 45 U.S. 80.

If we were to assume that it was not a deviation sufficient to take Hadley out of the course of employment, yet it was sufficient surely to take him out of the scope of employment. The law reads "course" and "scope". Hadley was not furthering his employer's interest when he went to San Francisco to cash his check or to have dinner with his mother. It was not connected with his employment but was for the employee's particular and personal benefit.

As cited in our opening brief, there are many cases similar in principle, if not the exact facts, of the

Wibye case. We will only burden the Court with a few more:

Bayless v. Mull, 50 C.A. (2d) 66, 122 P. (2d) 608.

There an auto salesman went out to see a sale prospect. On his way he stopped for dinner with a friend and then drove past the prospect's home in order to take his friend home. Held not in the course or scope of employment.

Also

Kruse v. White, 253 Pac. 178,
and two cases on page 13 hereof.

We may also point out there is no evidence as to whether Hadley was in fact working at the Stockton Quartermaster Depot on November 8, 1946. Appellees state inferences were discarded by the trial Court. The only evidence is that Hadley was going to see his mother and might stop off and cash a check. The time at which his mother expected him was approximately one hour after the time the accident happened. The Court can take judicial notice of the fact that the site of the accident was, roughly, one hour's driving distance from San Francisco.

What conclusion can be drawn from this? It seems to us that it was only on Hadley's personal business, as aforesaid. Appellees could have produced at the trial, if so, testimony that Hadley was working on that day or if he was visiting San Francisco on any other business but his own. Appellant knows of no reason for him to visit San Francisco but his own

business or pleasure. Having failed to show otherwise, they ask this Court to speculate and conjecture that Hadley might have been on Government business. There is, further, no evidence that Hadley was actually going to Fort Lewis by way of San Francisco. The evidence is that he was going to San Francisco on his personal pleasure.

Appellees contend (pp. 8-9) that Hadley was authorized to return to Fort Lewis via San Francisco because he had a choice of routes, as the Court found, and that his going to dinner in San Francisco with his mother was immaterial as he was in the course and scope of his employment. We disagree, (a) for the reason heretofore stated; (b) no evidence; (c) Hadley was not furthering his employer's business, which is the basic law; (d) under the cases cited a slight deviation to have dinner with a friend was held not within the course and scope of his employment; (e) the trial Court did not find Hadley had a choice of routes. It found (R.T. 33) “* * * upon completion of his assignment at Lathrop, California, to return to Fort Lewis, Washington * * *”. There is nothing about a choice of two main routes, as contended by appellees. As a matter of fact there is only one main direct route from Stockton (Lathrop), as we have pointed out. The appellees challenge appellant to point out the error of the trial Court in this finding. There is no error. We agreed he was to go to Fort Lewis, as distinguished from San Francisco. Our objection to the trial Court finding is that having found he was to return to Fort Lewis, it found that

going to San Francisco on personal business was within the course and scope of Hadley's employment at the time of the accident. (Par. 3 of the Findings; R.T. 33.) Their next contention is, in effect, that Hadley's instructions were within the knowledge of his superiors. This puzzles us as we offered to abide by the instructions given Hadley but we maintain Hadley had no instructions to go to San Francisco to have dinner with his mother or perhaps to cash his check. Certainly he could have cashed a check at Lathrop when he was known (not go 60 miles to do so), and as stated, an authorization for such a deviation would have to come from the Secretary of War. We, of course, can show no authorization from anyone in the Army as none was given, and the appellees show none for the same reason, yet appellees say it must be construed unfavorable to appellant. If Hadley was not authorized to do so, he certainly was prohibited as the Court can take judicial notice that Government employees are authorized as to what they are to do and, *a fortiori*, cannot do what is not authorized. It is true that Hadley was not directed to return by way of Sacramento, Redding and Medford, but that is the direct route and we believe it can be taken as true that Hadley was to return by the most direct route unless otherwise instructed. (See page 5 of this brief.) It certainly is presumed. Where is the line of demarcation? If he could deviate 60 miles, could he deviate 160 miles? The answer is—was it furthering his master's business. It is a public vehicle and comes under closer scrutiny of its use than a private

one, because of the Government's immense scope pertaining to 150 million people.

Appellees cited *Ryan v. Farrell* as the case in point (p. 12) but in the extract cited it states unless it appears that "the servant could not have been directly or indirectly serving his master". We believe that going to dinner with one's mother is not directly or indirectly serving the master (the Government). Appellees state Hadley had a "roving commission". (p. 13.) There is no evidence of this. The only evidence on which appellees base this is that Hadley was given in advance of leaving Seattle, an itinerary for the entire month of November, i.e., where he was to go. It provided for traveling from Stockton to Fort Lewis, Washington, on November 7 and 8, 1946. We do "fail to recognize" that this permits him to travel where he pleased. We repeat, there is no evidence of a "roving commission".

Appellant then concludes (p. 14) that "there was evidence to justify the conclusion that Hadley had business in San Francisco to transact with the Finance Office, and on this ground alone was in the course and scope of his employment". It seems unnecessary to repeat that *if* Hadley had business in San Francisco with a Finance Company or Finance Office, it was solely and absolutely his own business, to-wit, the cashing of his own personal check. Appellees state: (a) "we appear to object to Hadley's mother's testimony". We do not; (b) that the trial Court did not rely upon any preferences or presumptions. If so, our point is conceded; (c) that without the testimony of

Hadley's mother, the itinerary was sufficient and the appellant did not object to it. We repeat we did not object. We would have offered it. It is strong evidence of our position for the reasons stated. Appellees' dependence on the itinerary to prove Hadley was acting in the course and scope of his employment, in our opinion, shows the weakness of their position.

DISCRETIONARY.

Assume, as appellees contend, it was a discretionary duty with Hadley. If so, the act particularly exempts the Government from any liability for any discretionary act of its employees.

Under the heading "Exceptions" it is stated (Sec. 2680(a)):

"The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government * * * based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused". (Italics ours.)

This was interpreted in

Denny v. U. S., 171 Fed. (2d) 365;

Hendrick v. U. S., 82 F. S. 430;

Griggs v. U. S., 178 F. (2d) 1;

Thomas v. U. S., 81 F. Sup. 881;

Sickman v. U. S., decided by 7 C. Ct. 10-24-50.

(Parenthetically it may be noted that this exemption lends emphasis to the proposition that the plaintiff must prove that a Government employee was acting in the course and scope of his employment. If the Government is bound by any act of its employees, we can see where the Government would eventually go out of existence.)

Appellees claim that the Tort Claims Act is to be liberally construed. The Act's legislative history shows otherwise. The canon of construction which teaches that legislation of Congress should be strictly construed, has, we believe, been affirmed in the Supreme Court case of

U. S. v. Spelar, 93 L. Ed. 1105.

The Act was to provide a more satisfactory system for redressing Government torts than that provided by private bills, relieve Congress of the same and pass it on to the judges of the Federal Court. (Hence no juries were permitted and the attorneys' fees limited.) At first it was to be handled by the U. S. Employees' Compensation Commission but it was later changed to the present form. There are many Appellate Court decisions as to whether it should be liberally or strictly construed. The appellees cited

Spelar v. U. S., 171 F. (2d) 208,

as to liberality. However it is noted that the Supreme Court granted certiorari (93 L. Ed. 1105, *supra*) and the reason we believe it did so was that the Appellate Court may have been too liberal in its interpretation. In any event the case was reversed by the Supreme

Court. As stated in *Cropper v. United States*, 81 F. S. 81, 82—

“In construing the Tort Claims Act, however, it must be kept in mind that the Government has waived sovereign immunity to suits *only as to claims falling squarely within the four corners of the Act*”,

or as Judge Bone of this Appellate Court said in a case cited by appellees:

“The sovereign surrendered its immunity to suit *only* where the act in question is performed within the scope of (here Army) employment”. (Italics ours.)

The Supreme Court in

U. S. v. Sherwood, 312 U.S. 584, 590,

passed on this point when it stated that statutes which relinquish the immunity of the sovereign must be strictly interpreted.

APPELLEES' STATEMENT THAT THEY ARE ENTITLED TO INFERENCE THAT HADLEY WAS ON BUSINESS OF EMPLOYER. (p. 18.)

Appellees state that the Court did not pass on any supposed inference that possession of an auto owned by the Government gave rise to an inference Hadley was acting for the Government but stated the trial Court passed this question as “other admissible evidence establishes liability”.

Therefore we need not argue if there is an inference but need only refer to the “other evidence” but what

other evidence is there? There was no testimony or other evidence that Hadley was acting within the course and scope of his employment, unless appellees refer to the itinerary, which surely does not prove it. Appellees cited California cases that such an inference can be drawn from ownership of the automobile. There are also cases like

di Rebaylio v. Herndon, et al., 6 C.A. (2d) 567,
44 Pac. (2d) 581,

holding that driving is not *prima facie* evidence that it was being driven with the owner's permission.

Appellees say the California law applied. We agree *except* (a) where the Act specifically alleges certain things must be proven such as "acting within the course and scope of his office or employment"; (b) being a Federal Statute, the parties are bound by it and its exceptions and the Federal laws and decisions of the Federal Court relative thereto. However, as we have twice stated (page 6), the California law uniformly holds that the use of employer's automobile for the purpose of going to meals is not within the course and scope of his employment. We have heretofore cited numerous cases on this point but should the Court desire, here are two more:

Mauchle v. P.P.I.E., 37 C.A. 719, 174 Pac. 400;
Glough v. Allen, 115 C.A. 330, 1 Pac. (2d) 545.

Appellees state the "rule" (referring to Federal common law or the California law) is based upon logic, experience and fairness. We are willing to submit to the Court, if holding the Government liable in

this case would be logical, fair, or that experience justifies it.

Dated, San Francisco, California,
December 27, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellant.

No. 12,537

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

HAROLD WIBYE,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

CHAUNCEY TRAMUTOLO,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

ANTOINETTE E. MORGAN,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

*Attorneys for Appellant
and Petitioner.*

Subject Index

	Page
I.	
There is no evidence that decedent Hadley, at the time and place in question herein, was acting in any degree or to any extent in the course and scope of his employment by appellant, United States	2
A. San Francisco is not a waypoint in any of the customary routes leading from Stockton to Seattle.....	3
B. There is no evidence of what return route to Seattle the decedent intended to take after dining with his mother in San Francisco and, consequently, no evidence that decedent was proceeding to San Francisco in the pursuit of any business other than his own.....	4
II.	
In a suit against the United States under the Federal Tort Claims Act, for personal injuries due to the negligent operation of a motor vehicle on the part of a government employee, the burden of proving that the negligent act was committed in the course and scope of the employee's duties for the United States is upon the plaintiff, and no presumption to that effect arises from the fact that the employee was a government employee operating a government-owned vehicle. Furthermore, such a presumption, if at all applicable, must fail in the face of proof that the employee was using the vehicle for his personal affairs....	6
Conclusion	7

Table of Authorities Cited

Cases	Pages
Hubsch v. United States, 174 F.(2d) 7	6
Ryan v. Farrell, 208 Cal. 200	2, 7
Statutes	
5 U.S.C. Sec. 78(c)	4



No. 12,537

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	

VS.

NIELS K. WIBYE,	}
<i>Appellee.</i>	

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	

VS.

HAROLD WIBYE,	}
<i>Appellee.</i>	

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

A rehearing of the above cases is respectfully requested for the following reasons:

I.

THERE IS NO EVIDENCE THAT DECEDENT HADLEY, AT THE TIME AND PLACE IN QUESTION HEREIN, WAS ACTING IN ANY DEGREE OR TO ANY EXTENT IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BY APPELLANT, UNITED STATES.

This Honorable Court has held that recovery herein was justified because the decedent Hadley was, at the time of the accident, combining the business of his employer with that of his own; that, consequently, under the law of *Ryan v. Farrell*, 208 Cal. 200, decedent was then acting in the course and scope of his employment. We respectfully submit, however, and urgently request the opportunity to be further heard on the point, that actually there is no evidence whatever that at the time and place in question, the decedent was pursuing in any degree the business of his employer. Such a finding based on competent evidence is, of course, imperative to fix liability upon the appellant, United States, under the Federal Tort Claims Act.

All that the evidence here presented indicates is, that at the time of the accident, which occurred on Highway 50 between Stockton and San Francisco, decedent was intending to return to Seattle following the completion of his duties at Stockton, after first dining with his mother in San Francisco. It is submitted that this state of intent on decedent's part in no way indicates, directly or by inference, that decedent, while traveling from Stockton to San Francisco, was in any degree or respect acting in furtherance of

the business of his employer, the United States, that is, that his trip to San Francisco was part and parcel of his return trip to Seattle. Any such conclusion or inference from the known facts is negatived by the two following observations:

A. San Francisco is not a waypoint in any of the customary routes leading from Stockton to Seattle.

The following facts are within the judicial knowledge of this Court:

That on November 8, 1946 two main automobile highways were available to decedent in traveling northerly from Stockton to Seattle, namely: Highway 101, known as the Redwood Highway, and Highway 99, referred to in the opinion of this Honorable Court as the Inland Route; that traveling in a northerly and direct route from Stockton to Seattle, the Redwood Highway is not reached by going westerly to San Francisco, but by proceeding northerly to Cloverdale over a route passing through Rio Vista, ~~Vallejo~~, Napa, St. Helena and Calistoga; that the Inland Route leads northerly from Stockton through Woodland, Redding, Weed, etc. Thus, neither route called for a trip to San Francisco. Consequently, decedent's only purpose in going to San Francisco must have been to visit his mother. If he intended to thereafter enter the Redwood Highway from San Francisco, he would be taking a more circuitous route to reach it from Stockton than was at all necessary, merely to further his own personal ends. While engaged in this detour, he was not on the business of his employer,

but in the pursuit solely of his own affairs and not until he reached the Redwood Highway can it be said he resumed the duties of his employment. A side trip by a government employee with a government car, for personal ends, it is submitted, is not a slight deviation from the business of the government. It is, in fact, a ground for suspension by virtue of the following provisions of 5 U.S.C., Section 78(c):

“* * * any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft, or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant.”

- B.** There is no evidence of what return route to Seattle the decedent intended to take after dining with his mother in San Francisco and, consequently, no evidence that decedent was proceeding to San Francisco in the pursuit of any business other than his own.

We have observed that if decedent intended to take the Redwood Highway to Seattle, he went out of his way for his own purposes in first proceeding westerly from Stockton to San Francisco. This, we submit, was a substantial deviation from his authorized itinerary, for his own account and contrary to positive law. Actually, however, there is no evidence that

decedent intended to return to Seattle via the Redwood Highway after dining with his mother. All the evidence there is which bears on the question of decedent's intent in proceeding to San Francisco from Stockton is found in the testimony of his mother, Mrs. Edna D. Fipps, as follows:

“Q. In other words, that was all you know, that he said that he would get through up there in time so that he would come down in San Francisco and have dinner with you?

A. Yes, on Friday, on his way home. He was on his way back to Seattle.” (Tr. p. 157.)

The decedent may have intended to return to Seattle by proceeding inland again, through Vallejo, Dixon, Davis and Woodland, to pick up Highway 99 going northerly. This automobile route is a logical, customary and well traveled one from San Francisco to Seattle; and if it was decedent's intention to so return to Seattle by thus proceeding inland again to Highway 99 after visiting his mother in San Francisco, then obviously his trip to San Francisco was a complete deviation from his intended itinerary, for his own and for no other purpose. For otherwise, he could have proceeded northerly on Highway 99 directly from Stockton. We are thus compelled to conclude that there is no evidence to warrant the finding that decedent went to San Francisco on any business other than that of his own.

II.

IN A SUIT AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT, FOR PERSONAL INJURIES DUE TO THE NEGLIGENT OPERATION OF A MOTOR VEHICLE ON THE PART OF A GOVERNMENT EMPLOYEE, THE BURDEN OF PROVING THAT THE NEGLIGENT ACT WAS COMMITTED IN THE COURSE AND SCOPE OF THE EMPLOYEE'S DUTIES FOR THE UNITED STATES IS UPON THE PLAINTIFF, AND NO PRESUMPTION TO THAT EFFECT ARISES FROM THE FACT THAT THE EMPLOYEE WAS A GOVERNMENT EMPLOYEE OPERATING A GOVERNMENT-OWNED VEHICLE. FURTHERMORE, SUCH A PRESUMPTION, IF AT ALL APPLICABLE, MUST FAIL IN THE FACE OF PROOF THAT THE EMPLOYEE WAS USING THE VEHICLE FOR HIS PERSONAL AFFAIRS.

We submit that the case of *Hubsch v. United States*, 174 F. (2d) 7, correctly states the law with respect to the inapplicability, in suits against the United States under the Federal Tort Claims Act, of local law which creates a presumption of liability against an employer for the negligent acts of his employee, solely by virtue of the fact that the employee was at the time operating a motor vehicle belonging to the employer.

The United States has consented to be sued for the torts of its agents only when those torts are committed in the course and scope of their employment by the United States. Before any liability attaches against the United States for the tortious acts of its agents, it is a jurisdictional prerequisite that the Court find from the preponderance of the evidence before it, and not by resort to presumptions created by local law, that such acts were committed in and about the per-

formance of governmental duties. And if, as here, the proof establishes that the employee was using the vehicle to further his own purposes, certainly such presumption, even if otherwise applicable, must fall in the face of positive evidence to the contrary.

CONCLUSION.

For the reasons herein given, appellant respectfully submits that the law of the case, under the facts in evidence, is not as stated in *Ryan v. Farrell*, 208 Cal. 200, but is the law as the same is enunciated in the several cases set forth in appellant's opening brief, pages 6-17, and in appellant's reply brief, page 6. Furthermore, we are not here confronted with the question of whether in making the trip to San Francisco, there was a slight deviation from the course of decedent's employment as compared to a substantial deviation. Nor does this case present a situation in which the evidence warrants a finding that personal and business affairs were intermingled by decedent's trip to San Francisco. The case here shown is one in which all that appears from the evidence is that decedent, at the time of the accident, was on his way to dine with his mother before starting back to Seattle and after having concluded his duties at Stockton. There is, however, no evidence whatsoever that decedent, at the selfsame time and in the course and scope of his employment, was engaged in using the

highway between Stockton and San Francisco as a connecting link of his return route to Seattle.

Dated, San Francisco, California,

August 30, 1951.

Respectfully submitted,

CHAUNCEY TRAMUTOLO,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

ANTOINETTE E. MORGAN,

Assistant United States Attorney,

Attorneys for Appellant

and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and that it is not interposed for delay.

Dated, San Francisco, California,
August 30, 1951.

ANTOINETTE E. MORGAN,
Assistant United States Attorney.

No. 12,538

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD WILLIAMS,

Appellant,

v.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

NOV - 6 1950

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Contentions of appellant	9
Question	9
Contention of appellee	9
Argument	10
I. The alleged denial of assistance of counsel	11
II. The alleged involuntary guilty plea	12
Conclusion	13

Table of Authorities Cited

Cases	Page
Gimpelson v. Kaufman, et al. (C.C.A. 9), 167 Fed. (2d) 672, 675	11
Hall v. Johnston, 86 Fed. (2d) 820, 821	10
Johnson v. Zerbst, 304 U.S. 458, 468	10
Kelly v. Johnston (C.C.A. 9), 128 Fed. (2d) 793, 794.....	11
Macomber v. Hudspeth, 115 Fed. (2d) 114, 116	10
Pers v. Hudspeth, 110 Fed. (2d) 812	10

Statutes	
Title 28 U.S.C.A., Sections 451, 452, 453	1
Title 28 U.S.C.A., Sections 463, 225	2
Title 28 U.S.C.A., Sections 2241, 2243, 2255	1
Title 28 U.S.C.A., Section 2253	2

No. 12,538

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD WILLIAMS,

Appellant,

v.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below," denying appellant's petition for writ of habeas corpus and discharging writ of habeas corpus. (Tr. 32-33.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255, which superseded Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 U.S.C.A., Section 2253, which superseded Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below denying appellant's application for relief and discharging the writ of habeas corpus. (Tr. 32-33.) The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus, in which he alleged in substance that he was illegally restrained of his liberty by the appellee, the Warden of the State Penitentiary, because he was denied his right of assistance of counsel before the trial Court and that his plea of guilty was not voluntarily entered. (Tr. 1-21.) The Court below issued an order to show cause. (Tr. 22.) The appellee filed a return to order to show cause. (Tr. 23-25.) Appellant filed a traverse to return. (Tr. 26-31.) Thereafter a writ of habeas corpus was issued (Supp. Tr. 1-2, 3-4), to which appellee filed a return. (Supp. Tr. 5-7.) The hearing was granted on the writ of habeas corpus at which hearing appellant was represented by counsel. (Supp. Tr. 11.) It was stipulated between counsel that the traverse to the return to the order to show cause would be deemed as the traverse to the return to the writ of habeas corpus. (Supp. Tr. 12.) During the hearing appellant testified in his own behalf and documentary evidence was received in evidence on behalf of the appellee. (Supp. Tr. 11-76.) Thereafter, the Court below, after con-

sidering the cause, made its order denying appellant's application for relief and discharged the writ of habeas corpus (Tr. 32-33), and made the following findings of fact and conclusions of law adverse to appellant:

“FINDINGS OF FACT

I.

That petitioner is a citizen of the United States;

II.

That the petitioner is detained by respondent, E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 6718, by the District Court of the United States for the Western District of Tennessee, Western Division, hereinafter called 'the trial court,' on the 6th day of September, 1945, and under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal causes numbered 8489 and 8490, by the District Court of the United States for the Southern District of Indiana, Indianapolis Division, on the 19th day of March, 1946, and transfer order dated the 20th day of March, 1947, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

III.

That petitioner makes no contentions against the validity of the judgments and sentences in said criminal causes numbered 8489 and 8490, wherein he was sentenced to concurrent terms of 5 years for violations of the National Motor Vehicle Theft Act (18 U.S.C.A. 408), Assaulting an Officer (18 U.S.C.A. 254), and Escape from a Federal Penal Institution (18 U.S.C.A. 753-h), the sentences to run consecutively to the sentence heretofore imposed upon him by the trial court in said criminal cause numbered 6718; that with good time credits earned, the petitioner has already served a 5 year sentence;

IV.

That this is the first petition for writ of habeas corpus filed by the petitioner herein; that petitioner, in his application for writ of habeas corpus, attacks the validity of the judgment and sentence in said criminal cause numbered 6718; that the contentions advanced by the petitioner in his application for writ of habeas corpus were also urged by him, in said criminal cause numbered 6718, in his motion to vacate his judgment of conviction which was decided adversely to him by the trial court on the 21st day of September, 1948; that this order denying the petitioner's motion to vacate his judgment of conviction, in the aforesaid criminal cause numbered 6718, was affirmed by the United States Court of Appeals for the Sixth Circuit; that the mandate of the appellate court affirming the aforesaid order was filed in the trial court on the 16th day of November, 1949;

V.

That the indictment was returned in said criminal cause numbered 6718 by the Grand Jurors of the United States District Court for the Western District of Tennessee, Western Division, on the 5th day of September, 1945; that the indictment in said criminal cause numbered 6718 was in two counts and charged a violation of the National Motor Vehicle Theft Act, Title 18 U.S.C.A, Section 408;

VI.

That petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial court in said criminal cause numbered 6718; that the court, on learning that petitioner was without counsel, offered to appoint counsel to represent him, and that the petitioner declined the offer of the trial court to appoint counsel for him and elected to act as his own counsel, and so informed the trial court; that in waiving his right of assistance of counsel before the trial court, in said criminal cause numbered 6718, the petitioner did so intelligently, competently, intentionally, freely, and voluntarily;

VII.

That petitioner was duly arraigned before the trial court in said criminal cause numbered 6718, knew the nature of the charge against him, and intelligently, competently, intentionally, freely, and voluntarily entered a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718;

VIII.

That there was no fraud, trickery, misrepresentations, force or coercion practiced upon the petitioner in any manner whatsoever by any agents, officers, employees or representatives of the Government, for the purpose of having petitioner enter a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718; that petitioner has abandoned the contention which he originally made in his application for writ of habeas corpus, that he was induced and persuaded by the misrepresentations of agents of the Federal Bureau of Investigation to enter a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718, said petitioner testifying, under oath, during the habeas corpus proceedings that these accusations had no basis in fact; that petitioner's statement that a United States Attorney, or an Assistant United States Attorney, had a conversation with him prior to his appearance before the trial court, with reference to petitioner entering a plea of guilty to the charge contained in the indictment, in said criminal cause numbered 6718, is untrue;

IX.

That shortly after petitioner's apprehension and on July 14, 1945, petitioner was interviewed by Willis S. Turner, a Special Agent of the Federal Bureau of Investigation, to whom he freely and voluntarily admitted his commission of the offenses for which he was later indicted, in said criminal cause numbered 6718; that thereafter and on July 18, 1945, in a subsequent interview

with the aforesaid Willis S. Turner, in the presence of David E. McCollum, Special Agent of the Federal Bureau of Investigation, the oral confession of the petitioner, heretofore given on July 14, 1945, was reduced to writing, which written statement petitioner freely and voluntarily signed;

X.

That the petitioner had a full, fair and impartial hearing upon his plea of guilty, entered in said criminal cause numbered 6718;

XI.

That the petitioner, upon his plea of guilty to the two charges contained in the indictment, was sentenced to consecutive terms of 5 years in an institution to be designated by the Attorney General;

XII.

That prior to his sentence by the trial court, petitioner had a long record of convictions, including a felony conviction;

XIII.

That, as petitioner himself testified under oath during the habeas corpus proceedings, petitioner was guilty of the charges contained in the indictment in said criminal cause numbered 6718 and desired to plead guilty to the said charges and be sentenced by the trial court, in the hope that by such plea the authorities of the State of Virginia, where he was wanted for escape and assaulting a guard, and to which State he did not wish to return, might not thereafter press

charges against him; that this idea was petitioner's own idea, and no agent, officer, employee or representative of the Government at any time suggested the idea to him, or discussed the matter with him, or promised him anything;

XIV.

That petitioner has failed to sustain the burden of proving that he was denied due process of law or any of his constitutional rights before the trial court.

CONCLUSIONS OF LAW

I.

That the allegations made by petitioner in his application for writ of habeas corpus are wholly without merit;

II.

That none of the constitutional rights of petitioner were violated before the trial court;

III.

That petitioner was not denied due process of law before the trial court;

IV.

That the sentence which the petitioner is now serving in said criminal cause numbered 6718 is a valid judgment presently in full force and effect;

V.

That petitioner is now in the lawful custody and control of the respondent;

ORDERED: The petition for writ of habeas corpus is dismissed and the writ of habeas corpus is discharged."

From this latter order appellant now appeals to this Honorable Court. (Tr. 34.)

CONTENTIONS OF APPELLANT.

The contentions of appellant, as stated in his opening brief herein, at page 8, are as follows:

"1. That all of the facts and circumstances as developed by the evidence in the Court below show that he was not provided with counsel when he entered his plea of guilty to the indictment of Criminal Cause 6708.

2. That the facts and circumstances show that the plea of guilty made by the appellant was perhaps induced by some federal official and for that reason violates the due process clause."

QUESTION.

Are the contentions of the appellant supported by the record?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee respectfully calls the attention of this Honorable Court to the undisputed finding of the Court below that prior to his sentence by the trial Court, petitioner had a long record of convictions, including a felony conviction. (Tr. 47.) Thus the Court below could have disbelieved everything the appellant said and by relying solely on the presumption laid down by the Supreme Court of the United States in

Johnson v. Zerbst, 304 U.S. 458, 468,
that when collaterally attacked, the judgment of the Court carries with it the presumption of regularity, could have also properly arrived at the conclusion, which it did, that the appellant was not denied due process of law. See also

Hall v. Johnston, 86 Fed. (2d) 820, 821,
wherein this Honorable Court declared:

“* * * the trial Court had jurisdiction and as nothing appears upon the face of the record to indicate the contrary, the presumption will obtain that the defendant’s rights were carefully guarded throughout the proceedings.”

Bearing in mind this presumption, and bearing in mind also the familiar rule that the Court is the sole judge of the credibility of witnesses in a proceeding before it without a jury, and the equally familiar rule that its findings cannot be set aside unless clearly erroneous,

Pers v. Hudspeth, 110 Fed. (2d) 812;

Macomber v. Hudspeth, 115 Fed. (2d) 114,
116;

Kelly v. Johnston, (C.C.A.9), 128 Fed. (2d) 793, 794;

Gimpleson v. Kaufman, et al. (C.C.A.9), 167 Fed. (2d) 672, 675,

the appellee will now discuss the contentions of appellant in the order in which they are raised by him.

I.

THE ALLEGED DENIAL OF ASSISTANCE OF COUNSEL.

Appellant's contention that he was denied his right of assistance of counsel is not borne out by the record. The trial reporter's transcript of proceedings (respondent's Exhibit "D") shows that the appellant was offered the assistance of counsel but persistently refused the offer. Here was an intelligent waiver of a constitutional right by a confirmed, although a youthful, criminal, who knew of that right. Here was no novice in such matters; here rather was a flagrant violator of the law, whose frequent appearances before the courts had familiarized him with all the protections which the Constitution, through these same courts, afforded him. That appellant did not desire counsel was his prerogative. He knew that he was guilty of the crimes charged, and he also knew that, with or without the assistance of counsel, he could not avoid the consequences of his unlawful acts. His complaint, therefore, in this regard, was patently without merit, as the Court below found. Such a finding should not be disturbed.

II.

THE ALLEGED INVOLUNTARY GUILTY PLEA.

In his petition, appellant alleged in substance that his plea of guilty was not freely entered because, at the time he was under the impression that he had killed a guard in making an escape from a Virginia penal institution, he was told by representatives of the Government that if he did not so plead he would be immediately returned to Virginia to face a charge of murder as well as a charge of escape. During the hearing on the writ, appellant abandoned this contention, although he now feebly seeks to raise it again in his opening brief. The testimony of the agents and the prosecuting attorney, received in evidence in affidavit form, clearly negates such unsupported and unfounded contention. That appellant did not wish to return to Virginia was, of course, understandable, in view of the violent assault he had committed upon the person of a prison guard in effecting his escape. Certainly no Government agent suggested to him that he should plead guilty as an alternative to his being returned to Virginia. Appellant freely plead guilty because he was guilty. Appellant's abandoned allegation which he now seeks to revive, should find no more support before this Honorable Court than it did before the Court below, which held that it was untrue.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of the Court below, based on its findings, amply supported by the evidence, is correct and should be affirmed.

Dated, San Francisco, California,
November 3, 1950.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

No. 12539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED; ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the
United States.

PETITIONERS' OPENING BRIEF.

FILED

GEORGE T. ALTMAN,
327 General Petroleum Building, Los Angeles 17,
Attorney for Petitioners.

TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement	2
Specification of errors.....	4
Summary of argument.....	6
Argument	10

I.

The additions to the gross income of Rose based on total checks drawn by him on the Lori account should be reduced by the amount of Rose's own monies deposited in the Lori account	10
---	----

II.

The respondent's own evidence based on financial statements of Rose confirm the correctness of Rose's returns.....	15
--	----

III.

Lori being a mere title holder for or agent of Rose in respect to the property and funds appearing in its name, any income included in the Lori deposits should be included in the gross income of Rose and not Lori.....	22
---	----

IV.

Assuming Lori to be taxable on any income included in the Lori deposits, Lori should be allowed deduction for related expenses paid by Rose out of monies received from Lori.....	25
---	----

V.

There should also be excluded from Lori's income (a) monies borrowed by Rose as an individual and deposited in the Lori account, and (b) monies transferred from the Rose accounts to the Lori account not representing rentals allocable to the Villa Courts.....	27
--	----

VI.

An excess profits credit should be allowed Lori based on the net income, if any, computed for Lori for 1938 and 1939....	31
--	----

VII.

Rose being found to be the beneficial owner of the Villa Courts, the value of his use of a portion of said property should not be included in his gross income.....	33
---	----

VIII.

Rose's income all being community property, the community one-half share of his wife for 1938 should be excluded from his separate return for that year.....	34
--	----

IX.

The basis of the Silver King Coalition stock acquired by Rose as a fee and sold by him in 1941 should be the value thereof when acquired.....	35
---	----

X.

Petitioners must be allowed depreciation on depreciable income properties	37
---	----

XI.

Because of the numerous errors conceded and found in the Commissioner's deficiency determinations, no presumption of correctness should be attached to them.....	37
--	----

XII.

Petitioners' gross ignorance of accounting and income tax matters cannot be made a basis of fraud.....	40
Conclusion	45
Appendix. Provisions of the Internal Revenue Code.....App. p. 1	

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arnold, John B., v. Commissioner, 14 B. T. A. 954; appeal dism. 38 F. 2d 1011.....	42
Clinton Cotton Mills, Inc. v. Commissioner, 78 F. 2d 292.....	38
Cohan v. Commissioner, 39 F. 2d 540.....	37
Commissioner v. Plant, 76 F. 2d 8.....	33
Commissioner v. Wilcox, 327 U. S. 404, 66 S. Ct. 546.....	24
Federal National Bank of Shawnee v. Commissioner, 180 F. 2d 494	38
Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277.....	24
Haden v. Commissioner, 165 F. 2d 588.....	37
Harvey v. Commissioner, 171 F. 2d 952.....	37
Helvering v. Salvage, 297 U. S. 106, 56 S. Ct. 375.....	35, 36
Helvering v. Taylor, 293 U. S. 507, 55 S. Ct. 287.....	33, 36, 38, 39
Keokuk & Hamilton Bridge, Inc. v. Commissioner, 180 F. 2d 58	24
Minnesota Tea Company v. Helvering, 302 U. S. 609, 58 S. Ct. 393	26
Rickard v. Commissioner, 15 B. T. A. 316.....	43
Russell v. Commissioner, 45 F. 2d 100.....	38
Seattle Hardware Company v. Squire, 181 F. 2d 188.....	24
Spring City Foundry Co. v. Commissioner, 292 U. S. 182, 54 S. Ct. 644.....	15
United States v. Boston & Maine Railroad, 279 U. S. 732, 49 S. Ct. 505	27
United States v. Mitchell, 271 U. S. 9, 46 S. Ct. 418.....	15
Zimmerman v. Commissioner, 36 B. T. A. 618.....	32

iv.

STATUTES	PAGE
Internal Revenue Code, Sec. 23(1).....	37
Internal Revenue Code, Sec. 272.....	1
Internal Revenue Code, Sec. 293(b).....	40
Internal Revenue Code, Sec. 711(b).....	32
Internal Revenue Code, Sec. 711(b), (1), (B), (C), (G).....	32
Internal Revenue Code, Sec. 713.....	31
Internal Revenue Code, Sec. 713(f).....	31
Internal Revenue Code, Sec. 714.....	31
Internal Revenue Code, Sec. 1141.....	1
Internal Revenue Code, Sec. 1142.....	1
Revenue Act of 1938, Sec. 23(1).....	37
Rules of the United States Tax Court, Rule 50.....	39

No. 12539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED; ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

Jurisdiction.

The jurisdiction of this Court in this proceeding is based on sections 1141 and 1142 of the Internal Revenue Code. The jurisdiction of the Tax Court was based on section 272 of the Internal Revenue Code.

In T. C. Docket No. 5138, notices of deficiency in income taxes covering the year 1940 were issued to the individual petitioners on March 3, 1944. [R. 11.] On May 31, 1944, said petitioners filed petitions in the Tax Court of the United States for a redetermination of said taxes. [R. 15.] In T. C. Docket Nos. 11737 and 11738 similar notices covering 1938, 1939 and 1941 were issued May 9, 1946 [R. 498, 510]; and petitions therein were

filed in the Tax Court August 7, 1946. [R. 510, 531.] In T. C. Docket No. 5157 notices of deficiency in income, declared value excess-profits, and excess profits, taxes were issued to the corporate petitioner March 7, 1944 [R. 468]; and petition therein was filed in the Tax Court June 2, 1944. [R. 479.]

Because of their factual relation the four T. C. dockets were consolidated for trial. The Tax Court issued a single memorandum findings of fact and opinion on January 6, 1949, and entered its decisions in the several dockets November 21, 1949. [R. 456, 498, 513, 540.] The petition for review by this Court was filed February 17, 1950. [R. 546.]

Statement.

The controversy involves the proper determination of the petitioners' liability for federal income, declared value excess-profits, and excess profits, taxes for the years 1938 to 1941, inclusive.

Lori was organized in 1935. Although it was authorized by its charter to engage in general business activities, it merely held title to certain real estate and carried a bank account, both for the use and benefit of Rose. During the period herein involved Rose was president and treasurer of the said corporation, and owned two of its six issued shares. Rose and his wife came to California in 1927, at which time Rose was admitted to the Bar. Since that time he has engaged in the practice of law in Los Angeles.

The case involves a large number of questions of fact and also certain mixed questions of law and fact. The Commissioner recomputed the income of petitioners on the basis of deposits, and made some allowances of expenses on the basis of checks issued. He also included in the income of Rose all payments made out of the Lori bank account to or on behalf of Rose, and also all payments out of that account not otherwise explained. However, he introduced into evidence certain financial statements submitted by Rose to a bank which, if properly interpreted, completely destroy his computations based upon deposits and disbursements.

The Commissioner also determined that Rose was the beneficial owner of certain property held in the name of Lori; but he taxed the income therefrom to Lori. Further problems arise because of inter-account transfers, deposits resulting from loans, and expenses related to income of Lori paid by Rose out of his personal accounts, but not allowed to Lori by the Commissioner.

The Commissioner failed, moreover, to allow Lori an excess profits credit based upon his own computations of the net income of Lori for 1938 and 1939. The Commissioner also made no allowance for depreciation and imputed to Rose the rental value of property owned and used by him. The Commissioner also charged the petitioners with fraud. With some adjustments the various determinations made by the Commissioner were sustained by the Tax Court.

Specification of Errors.

Petitioners specify the following errors of the Tax Court:

I.

Failure to reduce the amounts added to the gross income of Rose based on total checks drawn by him on the Lori account, by the amounts of Rose's own monies deposited in the Lori account (\$10,000, \$1,456.76, and \$5,805.32 for the years 1939, 1940, and 1941, respectively), and by the amount (\$1,200.00) of salary from Lori separately reported by Rose.

II.

Use of financial statements of Rose made on the accrual basis as confirmation of income computed on the basis of deposits and disbursements.

III.

Failure to hold that, Rose being the beneficial owner of the property appearing in Lori's name, any income included in the Lori deposits should be included in the gross income of Rose and not Lori.

IV.

Assuming Lori to be taxable on any income included in the Lori deposits, failure to allow deduction to Lori for related expenses (\$10,748.62 for 1938 and \$6,107.21 for 1939), paid by Rose out of monies received from Lori.

V.

Failure also to exclude from Lori's income (a) monies borrowed by Rose as an individual and deposited in the Lori account (\$3,500.00, \$1,456.76, and \$3,200.00 for the years 1939, 1940, and 1941, respectively), and (b) monies

transferred from the Rose accounts to the Lori account not representing rentals allocable to the Villa Courts (\$1,075.00, \$1,500.00, and \$1,380.00 for the years 1939, 1940 and 1941, respectively).

VI.

Failure to allow Lori an excess profits credit based on the net income, if any, computed for Lori for 1938 and 1939.

VII.

Inclusion in the gross income of Rose of \$900.00 per year as the value of his use of a portion of the Villa Courts.

VIII.

Inclusion in the gross income of Rose for 1938 of his wife's one-half community share of income earned by him.

IX.

Failure to determine the basis of the Silver King Coalition stock sold in 1941 in accordance with the value of the stock when acquired.

X.

Failure to determine any allowance for depreciation on depreciable income properties.

XI.

Attachment of presumption of correctness to the Commissioner's determinations despite the numerous errors in said determinations conceded by the Commissioner and found by the Tax Court.

XII.

Imposition of the 50% fraud penalty on petitioners or any of them.

Summary of Argument.

I.

The Tax Court increased the gross income of Rose by the amounts of \$15,873.23, \$17,776.63, \$8,765.60 and \$7,384.12 for the years 1938, 1939, 1940, and 1941, respectively, as representing the *total* payments out of the Lori account to Rose or for his benefit. The Tax Court, however, failed to offset against those amounts monies belonging to Rose as an individual deposited in the Lori account. The evidence shows clearly such deposits in the total amounts of \$10,000.00, \$1,456.76, and \$5,805.32 for the years 1939, 1940, and 1941, respectively. The Tax Court also failed to deduct from said payments to Rose an amount of \$1,200.00 reported separately by him as salary received from Lori in 1941. To the extent of the Rose monies deposited in the Lori account, any payments to him were out of his own money. To the extent of the salary item, the inclusion of such payments in his gross income was a mere duplication.

II.

Rose was on a cash basis. The Tax Court accordingly computed his income on the basis of receipts and disbursements, relying on deposits as evidence of income receipts. However, it presented as confirmation of such computation evidence introduced by respondent consisting of financial statements prepared by Rose on the accrual basis and showing large amounts of accounts receivable.

The total net income of Rose and his wife for the four years involved was determined by the Commissioner at approximately \$117,000, and by the Tax Court at approximately \$79,000. On the returns filed, the total shown was

approximately \$37,000. These financial statements relied on by the Commissioner and the Tax Court, when reduced to a cash basis by eliminating the receivables, show a net income for the same period of \$41,000. The effect is, then, that they support the petitioners and show that the Tax Court's redeterminations were grossly erroneous.

III.

The Tax Court held that Rose was the beneficial owner of the property appearing in Lori's name. The evidence shows that Lori was a mere title holder of both the property and deposits appearing in its name, and that Rose was the real owner. It necessarily follows that any income included in those deposits was the income of Rose and not Lori.

IV.

The Tax Court computed Lori's income also on the basis of deposits. If any income included in the Lori deposits was Lori income, Lori should be allowed deduction for related expenses. Clearly it is immaterial that such expenses were paid not directly by Lori but by Rose out of monies received from Lori. Rose's bank accounts in that event were a mere conduit. Deduction of such expenses should therefore be allowed to Lori.

V.

(a) Rose borrowed certain amounts as an individual and deposited them in the Lori account. These amounts totaled \$3,500.00, \$1,456.76, and \$3,200.00 for the years 1939, 1940 and 1941, respectively. Obviously these amounts should be excluded from Lori income. They were not the income of Lori, nor were they income at all.

(b) Likewise, Lori deposits included mere transfers from the bank accounts of Rose. Of such transfers \$1,075, \$1,500, and \$1,380 were not excluded by the Tax Court from Lori income. Even if such transfers included income amounts received under a certain lease as contended by respondent in the Tax Court, they were, following the Tax Court's own method of computation, excludible from Lori's gross income because they were not allocable to the Villa Courts. On any basis, therefore, these amounts should be excluded from Lori income.

VI.

The Tax Court made a redetermination of the Lori income for 1938 and 1939. From such income the determination of an excess profits credit is a mere matter of mathematics. The Tax Court should therefore have computed such a credit.

VII.

The Tax Court held that the Villa Courts were beneficially owned by Rose, but it included in Rose's gross income the value of his use of a part of those Courts. It is clear law that a taxpayer is not taxable on the value of his use of his own property. It follows necessarily that the Tax Court erred in this respect.

VIII.

Mrs. Rose is not involved in these proceedings for 1938. Only Mr. Rose is involved. It follows necessarily that Mrs. Rose's community share of Rose's professional earnings for 1938 must be excluded. The Tax Court determined such earnings for 1938 but failed to make such exclusion.

IX.

Rose sold 1200 shares of Silver King Coalition stock in 1941. The Tax Court determined the basis of the

stock from a loan made by Rose on the security of the stock in 1937. However, he acquired the stock as a fee in 1936. Where property is so acquired, the basis is the fair market value when acquired. The Tax Court erred therefore in failing to determine and use such basis.

X.

Petitioners' gross income included building rentals. The Commissioner, however, disallowed the entire amount claimed by petitioners as depreciation. The Tax Court made no allowance for depreciation. It is the duty of the Tax Court to make a determination where it is clear that the Commissioner is wrong, even though the taxpayers' evidence may be unsatisfactory. Therefore, the Tax Court erred in this respect.

XI.

The Commissioner conceded numerous errors before the Tax Court. The Tax Court in its findings shows numerous other errors of the Commissioner. Still other errors of the Commissioner, shown above, did not appear in the Tax Court findings. Where the Commissioner's determinations contain numerous errors, the presumption of correctness which ordinarily attaches to them falls. In this case, therefore, the Tax Court should have placed no reliance upon the Commissioner's determinations and should have made its own independent determinations of the petitioners' income.

XII.

The worst that the evidence shows against the petitioners is gross ignorance and confusion. Not only does it fail to show any deliberate concealment of income; it shows, on the contrary, that the returns filed were substantially correct. Fraud cannot be predicated on confusion and ignorance. The imposition of fraud penalties here is therefore error.

ARGUMENT.

I.

The Additions to the Gross Income of Rose Based on Total Checks Drawn by Him on the Lori Account Should Be Reduced by the Amount of Rose's Own Monies Deposited in the Lori Account.

For each year the Commissioner added to the gross income of Rose an amount labeled "Income From Dividends and/or Gains and Profits from Lori, Ltd., Inc., dividends and/or Gains and Profits from Lori, Ltd., Inc.," the amounts for the respective years being as follows: 1938—\$15,873.23; 1939—\$17,776.63; 1940—\$8,765.60; 1941—\$7,384.12. [R. 439.]

The detail of the above amounts, as shown in the Commissioner's statutory deficiency notices, is as follows:

1938:

Payment made to bank by Lori, Ltd., Inc., on your note	\$ 2,111.55
Payment made to Harry Blank by Lori, Ltd., Inc., for your account.....	3,500.00
Payments made to M. Woods by Lori, Ltd., Inc., for your account.....	10.00
Withdrawals from Lori, Ltd., Inc., retained by you	6,095.00
Checks of Lori, Ltd., Inc., cashed by you and proceeds retained by you.....	150.00
Checks issued by Lori, Ltd., Inc., to others for your account	722.65
Checks drawn by you as president and treasurer of Lori, Ltd., Inc., and not otherwise accounted for	3,284.03
Total for 1938.....	<u><u>\$15,873.23</u></u>

1939:

Withdrawals from Lori, Ltd., Inc., deposited in your bank accounts and not otherwise included as income	\$12,299.65
Checks of Lori, Ltd., Inc., cashed and proceeds retained by you.....	1,854.50
Payment by Lori, Ltd., Inc., on your notes at banks	2,045.66
Payment made by Lori, Ltd., Inc., to others for your account	1,576.82
Total for 1939.....	<u>\$17,776.63</u>

1940:

Withdrawals deposited in your bank account.....	\$ 2,681.90
Other withdrawals received by you.....	5,054.45
Payment to bank on your note.....	1,000.00
Payments to others for your account.....	1,229.25
Total	<u>\$ 9,965.60</u>
Less: Salary reported as received from Lori, Ltd., Incorporated	1,200.00
Total for 1940.....	<u>\$ 8,765.60</u>

1941:

Withdrawals from Lori, Ltd., Inc., deposited in your bank accounts.....	\$ 2,616.00
Withdrawals from Lori, Ltd., Inc., and not de- posited in bank accounts.....	18,234.00
Payments by Lori, Ltd., Inc., on your notes at banks	1,701.50
Payments to others by Lori, Ltd., Inc., for your account	1,559.62
Total	<u>\$24,111.12</u>
Less: Credit by Commissioner for money of Rose (being an amount received as a fee) deposited in Lori account [R. 442].....	16,727.00
Total for 1941.....	<u>\$ 7,384.12</u>

The Tax Court made no change in any of the above items. As it can be seen, there has thus been included in the gross income of Rose all disbursements by Lori to Rose or for his account, including payments on his bank loans; including also all disbursements regarded by the Commissioner as unexplained. [R. 46.] There was only one deduction because of money belonging to Rose which was deposited in the Lori account; that is, the item of \$16,727.00 shown above. Obviously, if any amount paid by Lori to Rose or for his account is *ipso facto* treated as income to him, it should be offset by any monies belonging to Rose deposited in the Lori account. This the Commissioner did in respect to the one item of \$16,727.00. However, there are numerous other such items shown by the record. Taking only the obvious items and omitting those which are not absolutely clear in the record, there is the following list:

1939

Amount borrowed from bank by Rose as individual and deposited in Lori account September 1, 1939. [Loan shown in Exhibit R, p. D-4, and deposit in Exhibit 12]	\$ 2,000.00
Amount borrowed from bank by Rose as individual and deposited in Lori account December 7, 1939. [Note was for \$2,000.00, \$500.00 thereof being credited on loan account as final payment on principal of preceding note. Exhibit R, p. D-4. Interest of \$23.83 on preceding note credited on loan account on same date was paid by counter check dated December 7, 1939. Exhibit 94. The deposit of the net proceeds of the note, \$1500.00, appears in Exhibit 12]	1,500.00
Fee of Rose in connection with lawsuit against I.A.T.S.E., the amount thereof deposited in Lori account being [R. 446].....	6,500.00
	<hr/> <hr/>
	\$10,000.00

1940

Amount borrowed from bank by Rose as individual and deposited in Lori account July 31, 1940. [Note was for \$2,000.00, \$500.00 and \$43.24 thereof being credited on loan account as final payments on principal and interest, respectively, in respect of preceding note. Exhibit R, p. D-5. The deposit of the net proceeds of the new note, \$1,456.76, appears in Exhibit 12].....	\$ 1,456.76
Total for 1940.....	<u><u>\$ 1,456.76</u></u>

1941

Amount found by the Tax Court as representing deposit in Lori account of proceeds of personal loan by Rose [R. 446].....	\$ 2,605.32
Amount borrowed from bank by Rose as individual and deposited in Lori account February 3, 1941. [Loan appears in Exhibit R, p. D-5, and deposit in Exhibit 12]	1,700.00
Amount borrowed from bank by Rose as individual and deposited in Lori account April 21, 1941. [Loan appears in Exhibit R, p. D-5, and deposit in Exhibit 12].....	1,500.00
Total for 1941.....	<u><u>\$ 5,805.32</u></u>

The Commissioner in arriving at the figure of \$8,-765.60 which he added to Rose's gross income for 1940 as income derived by Rose from Lori deducted, as it is seen above, an amount of \$1200.00 as representing salary from Lori separately reported by Rose. The Commissioner, however, failed to make the same deduction for 1941. That Rose reported such salary separately for 1941 is shown by his return. [Ex. G.]

Summarizing the details shown above, the Commissioner, in arriving at the so-called "Income from Dividends and/or Gains and Profits from Lori, Ltd.," which he added to Rose's gross income, erroneously failed to exclude or offset the following amounts for the respective years:

1939

Monies belonging to Rose deposited in the Lori account	\$10,000.00
---	-------------

1940

Monies belonging to Rose deposited in the Lori account.....	1,456.76
--	----------

1941

Monies belonging to Rose deposited in the Lori account.....	\$5,805.32
Salary from Lori separately reported.....	1,200.00 7,005.32

These errors are obvious and clear on the face of the record. The Tax Court failed to eliminate them. As computation will show, elimination of these obvious errors alone will reduce the 1940 Rose deficiency to \$1,041.89, and will convert the Rose deficiencies for 1939 and 1941 into a net overpayment of \$25.90.

II.

The Respondent's Own Evidence Based on Financial Statements of Rose Confirm the Correctness of Rose's Returns.

As the Tax Court found, petitioners A. Brigham Rose and Zelletta M. Rose, husband and wife, filed their returns on a cash-calendar year basis. [R. 428.] In arriving at net income on a cash basis, no consideration may be given to accounts receivable or accounts payable; only actual receipts and disbursements may be given effect. *U. S. v. Mitchell*, 271 U. S. 9, 46 S. Ct. 418 (1926). Accounts receivable and payable signify the accrual basis. *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182, 54 S. Ct. 644 (1933). These are, of course, simple and self-evident propositions.

Respondent, nevertheless, introduced into evidence in the Court below, as Exhibit S, certain financial statements which petitioner Rose submitted to the Citizens National Bank for the purpose of obtaining credit. As the Tax Court observed, those statements show for the four years herein involved an increase of \$75,000 in petitioner Rose's net worth, and income for each of the years herein involved substantially in excess of that reported on his returns. [R. 444.] Apparently, however, the Tax Court failed to examine those financial statements in detail and to observe that they included amounts of accounts receivable and accounts payable. The accounts payable are negligible in amount, but the accounts receivable, while only \$6,200 in the statement at the beginning of the four-year period, are \$50,000 in the statement at the end of the period. Obviously those statements are on the accrual basis, and obviously also, the major share of the income and of the increase in net worth shown consists of income earned but not received.

The Commissioner introduced those financial statements for the purpose of corroborating his computation of net income based on bank deposits and disbursements. Those very statements, however, when adjusted to the same accounting basis, completely demolish his computation based on bank deposits and disbursements.

Taking the financial statements at the beginning and end of the period, that is the statements for June 11, 1938, and September 21, 1942, adjustment to a cash basis produces the following results:

SCHEDULE OF NET WORTH PER EXHIBIT S
June 11, 1938

	Per Exhibit S	Same Con- verted to Cash Basis
Cash in Following Banks.....	None	None
Accounts Due Me—Good	\$ 6,200	None
Listed Stocks and Bonds.....	8,300 ¹	\$ 8,300
Unlisted Stocks and Bonds.....	5,000	5,000
Real Estate and Buildings.....	66,200 ²	66,200
Mortgages and Trust Deeds—2nd Liens....	10,500	10,500
Mortgages and Trust Deeds—1st Liens.....	26,000	26,000
Automobiles and Trucks.....	500	500
Other Assets (Itemize) personal property..	4,500	4,500
 Total Assets	<u>\$127,200</u>	<u>\$121,000</u>
 Accounts Payable	\$ 300 ³	None
Other Liabilities (Itemize)		
“Broker on Loan”.....	4,000	4,000
Mortgages or Liens on Real Estate.....	12,500	12,500
 Total Liabilities	<u>\$ 16,800</u>	<u>\$ 16,500</u>
 Net Worth June 11, 1938.....	<u>\$110,400</u>	<u>\$104,500</u>

September 21, 1942

	Per Exhibit S	Same Con- verted to Cash Basis
Cash in Citizens National Bank.....	\$ 900	\$ 900
Accounts Receivable—Good	50,000	None
Listed Stocks and Bonds.....	23,100	415,600
Unlisted Stocks and Bonds.....	5,000	5,000
Real Estate and Buildings.....	64,900	566,200
Other Assets (Detail)		
Equity in Hotel and Villas, etc.....	40,000	636,500
Personal Property and Auto.....	None	75,000
 Total Assets	 \$183,900	 \$129,200
 Accounts Payable	 \$ 100	 None
Income Tax Payable.....	2,800	None
Mortgages or Liens on Real Estate.....	3,000	3,000
 Total Liabilities	 \$ 5,900	 \$ 3,000
 Net Worth Sept. 21, 1942.....	 \$178,000	 \$126,200

FOOTNOTES TO SCHEDULES

¹Amount corrected to conform to schedule on back of statement as follows:

SKC	\$7,200
SKW	1,000
Ed	100
 Total	 \$8,300

²Amount corrected to conform to total of schedule on back of statement.

³Labeled "Current" and shown as last item on statement.

⁴Corrected to conform items purchased since June 11, 1938, to cost as follows:

Silver King Coalition	\$ 3,600
Silver King Western	1,000
Amer. Tel & Tel.	11,000
 Total	 \$15,600

The Silver King Coalition shares were purchased for \$3,600 March 9, 1942, in the name of A. Brigham Rose, through J. A. Hogle & Co., brokers, 532 W. 6th Street, Los Angeles. (These are, of course, not the same shares involved in the loss taken on a sale in 1941.) The Silver King Western stock was on hand June 11, 1938, and appears in the financial statement of that date at the same value. The American Telephone and Telegraph stock was purchased for \$11,000 June 30, 1942, in the name of Z. Maud Rose, through J. A. Hogle & Co., brokers, 532 W. 6th Street, Los Angeles. The two purchases are, of course, easily verified by respondent. If the cause is remanded to the Tax Court for a redetermination, evidence on these purchases will be made a part of the record.

⁵Corrected to conform items to June 11, 1938, values, as follows:

1145-1147 No. Vine St.—2 Story Brick, Stores and Apartments	\$58,000
8621 Lookout Mountain Drive — 5 room stucco, furnished	4,500
7 Acres Hemet, California.....	2,700
10 Acres Kings County.....	1,000
 Total	 \$66,200

Note that this is before any allowance for depreciation for the period 6/11/38 to 9/21/42.

⁶Corrected to June 11, 1938, value of mortgages on same property, from which this item was derived. Note that the value given is only of the equity, not of the property, and that this is before any allowance for depreciation for the period 6/11/38 to 9/21/42.

⁷To include these items because included on June 11, 1938, statement and no evidence they were disposed of during interim.

COMPUTATION OF NET INCOME PER EXHIBIT S.

1. On Basis of Net Worth Data.

Net worth on cash basis Sept. 21, 1942 (see Schedule above).....	\$126,200
Net worth on cash basis June 11, 1938 (see Schedule above).....	104,500
	<hr/>
Increase	\$ 21,700
Personal expenses for 4-year period:	
Annual personal expenses per June 11, 1938, financial statement (corrected total of items listed)	\$ 7,340
Same per Sept. 21, 1942, financial statement.....	5,430
Intervening years, personal expenses not shown on financial statements, amounts estimated for 2 years on basis of average of above amounts (but excluding rent of \$1,080 from June 11, 1938, statement for this purpose since Tax Court found he lived in apartment beneficially owned by him).....	11,690
	<hr/>
Total for 4 years.....	\$24,460
Add 1941 income taxes apparently paid before Sept. 21, 1942, (as shown by accrual of balance of \$2,800 on financial statement of that date) but not included in itemization of personal ex- penses	2,800
	<hr/>
Total personal expenses for 4-year period.....	27,260
	<hr/>
Total net income for years 1938 to 1941, inclusive, based on net worth data in Exhibit S, but before any allowance for depreciation	<u>\$ 48,960</u>

While the above computation covers A. Brigham and Zelletta M. Rose, it also includes Lori, since Exhibit S shows that Lori was only a title holder. See following wording on September 21, 1942, financial statement under "Other Assets (Detail)":

"equity in Hotel & Villas—Re Estate—
1140-1156 Lillian Way and 6326 Lexington
Avenue—*in name of Lori Ltd.*" (Italics added)

2. On Basis of Income Data.

Income per Exhibit S (these figures from Exhibit S are given in

Memorandum Findings of Fact and Opinion, R. 444) :

Date of Financial Statement	Amount
6-11-38	\$13,500.00
4-29-39 (In excess of)	10,000.00
3- 1-40 (In excess of)	20,000.00
9-21-42	41,800.00
Total—4 years	\$85,300.00

Deduct net increase in accrued income per Exhibit S
in order to convert to cash basis :

9-21-42 financial statement

Accounts Receivable\$50,000.00

Less Accounts Payable..... 100.00 \$49,900.00

6-11-38 financial statement

Accounts Receivable\$ 6,200.00

Less Accounts Payable..... 300.00 5,900.00

Net increase in accrued income per Exhibit S..... 44,000.00

Total net income for years 1938 to 1941, inclusive,

based on income data in Exhibit S.....\$41,300.00

Now compare the results shown above with the net income shown by the returns and the net income computations of the Commissioner and the Tax Court, as follows :

	Per Returns	Per Deficiency Notices	Per Tax Court Decisions
1938	None	\$ 26,374.72	\$ 8,203.21
1939 A. Brigham Rose.....	\$ 3,039.92	17,871.36	10,925.28
Zelletta M. Rose.....	3,039.92	17,871.36	10,925.28
1940 Joint return	2,636.57	17,016.40	15,059.99
1941 A. Brigham Rose.....	14,495.10	18,955.65	17,213.15
Zelletta M. Rose.....	14,495.10	18,955.65	17,213.15
Total	\$37,706.61	\$117,045.14	\$79,540.06

To adjust basis of assets to
Exhibit S:

Add back loss on stock deducted in 1941	2,773.50	2,773.50	2,773.50
	<u>40,480.11</u>	<u>119,818.64</u>	<u>82,313.56</u>

Deduct:

Value of stock per Exhibit S
(financial statement
June 11, 1938) \$7,200.00

Net selling price 4,053.00	3,147.00	3,147.00	3,147.00
	<u> </u>	<u> </u>	<u> </u>

Total net income for years 1938 to 1941, inclusive, with basis of assets adjusted to Exhibit S	\$37,333.11	\$116,671.64	\$79,166.56
	<u> </u>	<u> </u>	<u> </u>

Now observe the effect of this comparison. Respondent's Exhibit S, adjusted to a cash basis, shows the net income of Rose and his wife for the four-year period at \$49,000.00 approximately, before any allowance for depreciation, on the basis of net worth data, and at \$41,000.00 approximately on the basis of income data. On their returns petitioners reported income totaling approximately \$37,000.00. However, the Commissioner on the basis of deposits and disbursements arrived at a figure of \$117,000.00, and the Tax Court at a total of \$79,000.00. Hence, Exhibit S, which the Commissioner intended as corroboration for his computation based on deposits and disbursements, only makes those computations appear absurd and confirms the truth and accuracy of petitioners' returns.

It follows by the Commissioner's own evidence that the petitioners' returns were correct, or fairly so. If there were erroneous omissions from income, substantially similar amounts must erroneously have been included in income, or omitted from deductions.

III.

Lori Being a Mere Title Holder for or Agent of Rose in Respect to the Property and Funds Appearing in Its Name, Any Income Included in the Lori Deposits Should Be Included in the Gross Income of Rose and Not Lori.

The Tax Court found that while Lori was authorized by its charter to engage in general business activities it “did engage in the business of holding real estate.” [R. 428.] Nowhere in the record is there any indication that Lori engaged in anything else. It held title to the Villa Courts. [R. 433.] Nowhere does it appear that it held title to any other property. Even as to that one property, it was a mere title holder; for, as the Tax Court found, those courts “*were beneficially owned by Rose*, subject to the encumbrances against them and the unliquidated claim of Mary Woods *against Rose*”; and by his expenditures on behalf of Lori, Rose “sought to and did thereby protect and preserve *his*” equity in the property. [R. 433, 441—Italics supplied.] Furthermore, on the financial statement of petitioner Rose, dated September 21, 1942, included in Respondent’s Exhibit S, there is, as already observed, the following explanation of the item “Other Assets”:

“equity in Hotel and Villas—Re Estate—1140-1156 Lillian Way and 6326 Lexington Avenue—in name of Lori, Ltd.” (Italics added.)

The only other thing which appeared in Lori’s name was a bank account. As to that, the Tax Court found that it was used by Rose for his “personal deposits and expenditures.” [R. 431.] The Tax Court further found that the Lori bank account was “used during the years in question as a depository of substantial sums, in which

it had no interest, including receipts from petitioner's law business and sums reflecting receipts from the hotel operations." [R. 447.] As to the receipts from the Villa Courts, when respondent's witness, Silvester Rocco, was asked on direct examination "just what function Lori served in this picture, that is, what activity it carried on in respect of these villas," he answered: "The only activity I could determine was to receive cash—that I could determine—and allow Mr. Rose to withdraw it." [R. 70.]

On direct examination, Rocco was also asked whether Lori "was authorized to carry on various activities in addition to holding this property." [R. 70.] Why he was asked that question, it is not clear, except possibly as a substitute for a showing that there were in fact any activities. When the same witness, however, was asked what expenses Lori had, he admitted that he had allowed as expenses only \$44.85 for the year 1938. [R. 70-71.] One can well imagine what activities a corporation could engage in on \$44.85 for an entire year. The Tax Court itself was perplexed by this fact. Note the Court's statement [R. 72]:

"Rather quaint way to do business, to have a corporation with gross income of around \$25,000.00 and no appreciable expenses, and fail to pay its taxes."

Nor was all this merely a result of control resulting from ownership of stock. The Tax Court found that of "the six issued shares of stock of Lori, two were held by petitioner, two were issued in the name of Paul Angelillo, who was its vice-president, and was also an attorney associated with petitioner, maintaining his office at the same address, and the remaining two shares were issued in the name of P. M. Woods, the stepfather of Mary Allen, who was a client of petitioner." [R. 428-429.]

The proper and only conclusion is that Lori was a mere agent or title holder and had no beneficial interest in the property which stood in its name or in the funds which were received and disbursed in its name.

Where a corporation is simply the agent, fiduciary or *alter ego* of another person, or merely the conduit of funds of another person, that corporation must be disregarded as a separate taxable entity. Such is the clear effect of this Court's decision in *Scattle Hardware Company v. Squire*, 181 F. 2d 188 (1950). The same rule was stated by the Eighth Circuit in *Keokuk & Hamilton Bridge, Inc. v. Commissioner*, 180 F. 2d 58 (1950).

The latter case cites pertinent decisions of the Supreme Court. Thus, as there quoted, in *Commissioner v. Wilcox*, 327 U. S. 404, 66 S. Ct. 546 (1946), the Supreme Court stated as one of the conditions of taxable gain that there be present a "claim of right to the alleged gain." Again, in *Griffiths v. Commissioner*, 308 U. S. 355, 60 S. Ct. 277 (1940), the Supreme Court stated, 308 U. S. at page 357:

"We cannot too often reiterate that 'taxation is not so much concerned with requirements of title as it is with actual command over the property taxed—the *actual benefit* for which the tax is paid.'"
(Italics added.)

It must follow from the cases above cited that Lori is not a separate taxable entity and that no tax should have been imposed upon it. If any income was received in the name of Lori, it should be taxed to Rose.

IV.

Assuming Lori to Be Taxable on Any Income Included in the Lori Deposits, Lori Should Be Allowed Deduction for Related Expenses Paid by Rose Out of Monies Received From Lori.

In its findings, the Tax Court made the following allowances to Rose under the title of "Current operating expenses of Lori and Hotel paid from bank accounts of Rose" [R. 441]:

1938	\$10,748.62
1939	6,107.21

The above items are apparently totals of the following:

1938

Exhibit	R.		Amount
15	144-148	Employee wages	\$ 6,209.73
16	148	Utilities	1,552.43
17	149	H. Wall advertising on hotel	425.00
18	149	R. E. taxes on hotel	1,595.95
19	149	R. E. taxes on Lori apts.	508.65*
20	150	Street bond assessment	40.09
21	150-152	1937 taxes paid in 1938	263.27
23	153	Repairs	53.50
48	169-170	Plastering	100.00
			<hr/>
			\$10,748.62

1939

Exhibit	R.		Amount
58	197	Hotel repairs—Labor & Material	\$ 485.47*
68	201	Misc. Expense on hotel	2,928.20
69	201-202	Interest paid on mortgage loans, Hotel Angie	940.00
86	208-209	Real estate taxes paid	1,753.54
			<hr/>
			\$ 6,107.21

*Amount per Exhibit in each case.

In reference to the above amounts, the Tax Court stated [R. 441], that:

“The expenditures made by Rose on behalf of Lori and the hotel operations were out of funds received by Rose from Lori. Lori, in turn, received gross sums from Brevoort Enterprises covering both the hotel and Villa Court operations. By these expenditures petitioner sought to and did thereby protect and preserve his equities in the various properties, the operations of which inured to his benefit.”

In other words, Lori received monies in respect of the hotel and Villa Court operations from Brevoort Enterprises, and paid them out through Rose for hotel and Villa Court expenses. Clearly if these items had been paid directly by Lori, no question could be raised as to their deductibility to Lori. The Tax Court computed Lori's gross income on the basis of Lori deposits, which included both hotel and Villa Court receipts; and these expense items were hotel and Villa Court expenses.

There appears to be no reason why these expense items should not be allowed merely because the payments were made through the bank accounts of Rose. Where one person pays the expenses of another, those expenses are constructively paid by the other as if he had himself made the payments.

Minnesota Tea Company v. Helvering, 302 U. S. 609, 58 S. Ct. 393 (1938).

In the case cited, the Supreme Court stated, 302 U. S. at page 613:

“The conclusion is inescapable, as the court below very clearly pointed out, that by this roundabout process, petitioner received the same benefit ‘as

though it had retained that amount from distribution and applied it to the payment of such indebtedness.' ”

To the same effect,

U. S. v. Boston & Maine Railroad, 279 U. S. 732,
49 S. Ct. 505 (1929).

It follows clearly that the total of \$10,748.62 should be allowed as an additional deduction to Lori for 1938, and the total of \$6,107.21 as an additional deduction to Lori for 1939.

V.

There Should Also Be Excluded From Lori's Income

(a) Monies Borrowed by Rose as an Individual and Deposited in the Lori Account, and (b) Monies Transferred From the Rose Accounts to the Lori Account Not Representing Rentals Allocable to the Villa Courts.

As the Tax Court found, Lori's bank account was used during the years in question as a depository of substantial sums in which it had no interest. [R. 447.] The Tax Court, in fact, excluded from Lori income certain deposits in the Lori bank account which were not income, or were not income of Lori. [R. 446.] There are many others of the same character which it failed to exclude.

(a) Such other items which should be excluded from the income of Lori include Lori deposits resulting from bank loans made by petitioner Rose, as follows:

Date	Amount
September 1, 1939	\$2,000.00
December 7, 1939	1,500.00
July 31, 1940	1,456.76
February 3, 1941	1,700.00
April 21, 1941	1,500.00

These same loans appear under point I above. Citation to the record and explanatory notes are given there. Since the determination of the net income of Lori was made by the Tax Court on the basis of deposits, it is obvious that the above deposits should have been excluded.

(b) Such other items which should be excluded from the income of Lori include also monies transferred from the Rose accounts to the Lori account not representing rentals allocable to the Villa Courts.

The Tax Court in its findings presents what it states is petitioners' analysis of Lori's bank deposits. [R. 446-447.] Included in that analysis and not presented in said findings, however, are the following transfers from the Rose accounts to the Lori account:

Date	Exhibit	Amount	Total for Year
October 7, 1938	26	\$1,100.00	\$1,100.00
October 17, 1939	71	\$1,075.00	\$1,075.00
October 30, 1940	91	\$ 500.00	
December 18, 1940	91	1,000.00	\$1,500.00
August 1, 1941	91	\$ 80.00	
March 19, 1941	91	900.00	
February 18, 1941	91	400.00	\$1,380.00

As to 1938, respondent conceded that the amount of \$1,100.00 should be excluded from Lori income and the Tax Court so excluded it. [R. 446.] As to the other

years, however, respondent contended in his brief in the Tax Court, pp. 47, 60, that the amounts should not be excluded from Lori's income because they represented additional receipts under a lease to one F. A. Linck, which lease covered in part the Villa Courts held in Lori's name. [That lease is explained by the Tax Court at R. 435.]

Now the Tax Court allowed exclusion from Lori income of the excess of the receipts under that lease over the amounts allocable to the Villa Courts. The amounts so excluded are as follows:

1939	(This amount is included in a total of \$8,966.51. See Exhibit FF and R. 446)	\$3,316.51
1940	R. 447	4,130.92
1941	R. 447	3,955.00

These amounts were computed by the Tax Court by deducting the receipts under the Linck lease allocable to the Villa Courts from the amounts shown by petitioner's analysis as total receipts under the Linck lease included in the Lori deposits.

For example, for 1940 such total receipts were \$8,930.92 [R. 447], which less the amount excluded of \$4,130.92, shown above, equals \$4,800.00, or one-third of \$1,200.00 per month, which was the rental allocable to the Villa Courts. [R. 435-436.] For 1941 the corresponding computation is \$8,355.00 [R. 447], less \$3,955.00 shown above, or \$4,400.00, the amount allocable to the Villa Courts. (Actually the figure for 1940 should also have been \$4,400.00, instead of \$4,800.00, since \$100.00 per month was abated on the rent, leaving the net rental at

\$1,100.00 per month [R. 435]; and the amount excluded for 1940 should therefore have been \$4,530.92 instead of \$4,130.92.)

It follows that the amounts of \$1,075.00, \$1,500.00 and \$1,380.00, representing transfers from the Rose accounts to the Lori account for the years 1939, 1940 and 1941, respectively, were not considered by the Tax Court in arriving at the receipts under the Linck lease when it computed the amounts to be excluded from Lori income because not allocable to the Villa Courts. Yet it is clear that these amounts of \$1,075, \$1,500 and \$1,380, if not excludible simply as transfers from the Rose accounts, which they were, should, as respondent contended in his brief in the Tax Court, have been added to the receipts under the Linck lease included in the Lori deposits. When so added, they increase *pro tanto* the amounts of such receipts excludible from Lori income because not allocable to the Villa Courts. Either as mere transfers from the Rose accounts, therefore, or as receipts under the Linck lease, these amounts should be excluded from Lori income.

Petitioners do not concede that the items described under (a) and (b) above are the only other items which should be excluded from the Lori income. These are merely the items which appear clear on the face of the record.

VI.

An Excess Profits Credit Should Be Allowed Lori Based on the Net Income, if Any, Computed for Lori for 1938 and 1939.

Sections 713 and 714 of the Internal Revenue Code provided the methods for determining the amount of normal earnings of a taxpayer the excess over which was made subject to the excess profits tax. Section 713 provided the income method, under which such normal earnings were based on the average income for the years 1936 to 1939, inclusive. Those years were called the "base period," and the average income of those years was called the "average base period net income." The final figure to be used, the "excess profits credit," was 95% of the "average base period net income," plus specified adjustments.

Under 713(f) this income method was given a variation generally known as the "growth formula." Under that formula, if the average annual income of the second half of the base period, that is, the years 1938 and 1939, exceeded the average annual income of the first half of the base period, that is, the years 1936 and 1937, then the figure to be used as average base period net income was the average of the second half of the base period, plus one-half of the increase of the annual average of the second over that of the first, with a limitation to the highest year in the base period.

It is obvious from this formula that it is mathematically impossible for the excess profits credit to be less than 95% of the average income of the second half of the base period, that is, the average of the years 1938 and 1939. The net income for those two years as determined by the

Tax Court was \$9,488.13 and \$8,167.24, respectively, so that said average net income was \$8,827.68.

Where a result follows mathematically it must be given effect in a recomputation of taxes, even though no issue respecting that result is raised in the pleadings. (*Zimmerman v. Commissioner*, 36 B. T. A. 618 (1937).) The Board there stated, at page 620:

“In other words, in view of the law as it was at the time of filing of the petitions herein, the issue of the reduction of the charitable gifts bases was a matter petitioners should have foreseen to be necessarily involved in the arithmetical calculations incident to a recomputation along the lines of their contentions in the petitions filed herein.”

It is true that in arriving at the “average base period net income” the income used for each year in the base period is the “excess profits net income,” which is the net income plus or minus certain adjustments, mostly elimination of abnormal deductions. (I. R. C. Sec. 711(b).) It is true also that there is no finding by the Tax Court here with respect to the excess profits net income of either 1938 or 1939. However, the adjustments from net income to excess profits net income are mostly plus adjustments, the elimination of abnormal deductions. The only minus adjustments are for dividends received, capital gains, and income from retirement or discharge of bonds. (I. R. C., Secs. 711(b) (1) (B), (C), (G).) There is nothing in the findings, nor anything anywhere in the record, to give the slightest suggestion that any such income might exist here. The only type of income referred to in respect to Lori is rentals. In any event, if such a

finding was necessary, it was the duty of the Tax Court to make it. (*Helvering v. Taylor*, 293 U. S. 507, 55 S. Ct. 287 (1935).)

If an excess profits credit is allowed here equal to the average net income of 1938 and 1939, as the net income of those years is computed by the Tax Court, there is, as computation will show, no excess profits tax liability.

VII.

Rose Being Found to Be the Beneficial Owner of the Villa Courts, the Value of His Use of a Portion of Said Property Should Not Be Included in His Gross Income.

Since the Tax Court treated Rose as the beneficial owner of the Villa Courts, there is no basis upon which there can be included in the income of Rose the amount of \$900.00 per year as the rental value of the part of that property occupied by him. That amount was included each year in the statutory notices. [R. 439.]

An owner of property, or one who has the beneficial interest in property, is not taxable under the income tax on the value of the use of the property. (*Commissioner v. Plant* (C. C. A. 2), 76 F. 2d 8 (1935).) The Court of Appeals for the Second Circuit there stated, at page 10:

“It is apparent from the foregoing that the case is like one of a trust under which the trustee is directed to keep a house in repair and allow a beneficiary to live in it rent free. The advantage derived by a beneficiary under such a trust is not taxable as part of his income.”

It must follow that these amounts of \$900.00 per year are not includible in Rose's gross income.

VIII.

Rose's Income All Being Community Property, the Community One-half Share of His Wife for 1938 Should Be Excluded From His Separate Return for That Year.

The findings show that petitioner Rose and his wife were husband and wife domiciled in the State of California. [R. 428.] They came to California in 1927, at which time Rose was admitted to the Bar and commenced to practice law. Since that time he has been engaged in the practice of that profession in Los Angeles. [R. 429.]

Petitioner Rose's property interests began in 1931 [R. 431.] In any event, his professional income, it is clear, was community income.

The Commissioner's deficiency notice shows Rose's professional income for 1938 to be \$8,172.55. [R. 438.] The Tax Court does not indicate that it made any change in that amount. The Tax Court, however, failed to exclude one-half of that amount or any part of it from the income of Rose as being instead the community share of his wife.

There is no finding that Rose filed a joint return for 1938. On the contrary, it appears clear from the Tax Court's findings that no such return was filed. [R. 429.] The deficiency notice for 1938 was addressed to A. Brigham Rose only. [R. 525.] In respect to that year, the petition filed in the Tax Court, Docket 11,738, shows the name of A. Brigham Rose only. The statutory deficiency notice issued to Mrs. Rose does not show 1938 [R. 506], nor, of course, does the petition filed by her in the Tax Court, Docket 11,737. [R. 498.]

It is clear then that as far as 1938 is concerned, Mrs. Zelletta M. Rose is not involved in these proceedings at all. Her income for that year must therefore be excluded. The Tax Court clearly erred in that respect.

IX.

The Basis of the Silver King Coalition Stock Acquired by Rose as a Fee and Sold by Him in 1941 Should Be the Value Thereof When Acquired.

In 1941, Rose sold 1200 shares of Silver King Coalition stock. Rose reported a loss on the sale based upon a figure of \$9,600.00 as the cost of the stock. Respondent cut the basis down to \$4,500.00, alleging that that was cost of the stock and that it was acquired by petitioner November 18, 1937, at that figure. [R. 529-530.] The Tax Court sustained the Commissioner, merely saying:

“Respondent allowed as a basis for this stock the amount of \$4,500.00, the maximum allowable therefore at the date of acquisition.” [R. 443.]

The record is clear, however, that the figure of \$4,500.00 was only the amount of a loan which petitioner made against the stock in 1937 at the brokerage house of Hogle & Co. [R. 298.] The stock was actually acquired as a fee in 1936. [R. 298.] The basis of the stock was therefore the value of the stock when petitioner acquired it. (*Helvering v. Salvage*, 297 U. S. 106, 56 S. Ct. 375 (1936).)

In the *Salvage* case, stock was purchased in 1922 at \$100.00 per share, although its market value at the date of acquisition was \$1,164.70. The difference was consideration for an agreement not to compete and for other covenants. The taxpayer sold the stock in 1929. The Supreme Court held that the basis for computing gain or loss on the sale was \$1,164.70. It also held that the failure to disclose the difference between the amount paid and market value in 1922 as taxable gain apparently resulted from an innocent mistake of law, and that there was nothing therefore to support a claim of estoppel.

If the respondent did not agree that the figure of \$9,600.00 was the correct value of the Silver King Coalition stock when petitioner acquired it, he should have substituted another figure based upon a valuation at the time petitioner acquired it, and not upon an amount which petitioner borrowed on the stock in the following year. Furthermore, upon this state of the facts, it was the duty of the Tax Court to make such a valuation and not merely to adopt respondent's determination. (*Helvering v. Taylor, supra.*) The Tax Court questioned petitioner Rose at length in regard to that stock. [R. 297-301.] At no time, however, did it ask the question essential to a determination of basis, that is, under the circumstances as stated, what was the value of the stock when Rose acquired it, or what evidence he had, if any, of its value when he acquired it. The Tax Court erred in failing to make such a determination.

X.

Petitioners Must Be Allowed Depreciation on Depreciable Income Properties.

The Commissioner disallowed completely the deductions which Lori took for depreciation. [R. 473, 475, 477.] The Tax Court sustained these disallowances. Neither the Commissioner nor the Tax Court allowed any depreciation to the individual petitioners.

Rentals from buildings owned by petitioners were included in gross income. [R. 435.] Some allowance must therefore be made for depreciation. (Revenue Act of 1938, Sec. 23(1); Internal Revenue Code, Sec. 23(1).)

Under the circumstances, even if the petitioners' evidence was unsatisfactory, it was the duty of the Tax Court to determine an allowance for depreciation.

Harvey v. Commissioner (C. C. A. 9), 171 F. 2d 952 (1949);

Haden v. Commissioner (C. C. A. 5), 165 F. 2d 588 (1948);

Cohan v. Commissioner (C. C. A. 2), 39 F. 2d 540 (1930).

XI.

Because of the Numerous Errors Conceded and Found in the Commissioner's Deficiency Determinations, No Presumption of Correctness Should Be Attached to Them.

The presumption of correctness which ordinarily attaches to the Commissioner's deficiency notices has been overcome by the gross errors in said notices conceded by the Commissioner [R. 440-446], the numerous errors therein found by the Tax Court [R. 441, 447], and the

errors pointed out herein which the Tax Court should also have found.

Helvering v. Taylor, supra;

Clinton Cotton Mills, Inc. v. Commissioner (C. C. A. 4), 78 F. 2d 292 (1935);

Russell v. Commissioner (C. C. A. 1), 45 F. 2d 100 (1930);

Federal National Bank of Shawnee v. Commissioner (C. C. A. 10), 180 F. 2d 494 (1950).

In the *Russell* case, the Court of Appeals for the First Circuit, stated, at page 103:

“While there is a presumption that the commissioner’s findings are correct (*Avery v. Commissioner*, 22 Fed. (2d) 6), when it appears, as in this record it does appear, that the methods pursued by the commissioner were mathematically and legally erroneous, that presumption no longer avails. *New York Life Ins. Co. v. Ross*, 30 Fed. (2d) 80, 82.”

In the *Taylor* case the Supreme Court stated, 293 U. S. at p. 515:

“But, where as in this case the taxpayer’s evidence shows the commissioner’s determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the

apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax."

On February 7, 1949, petitioners filed in the Tax Court a motion for rehearing. [R. 4.] In that motion, which was the first time undersigned counsel entered this case [R. 4], petitioners pointed out some of the obvious errors shown above in this brief. That motion for rehearing was denied May 5, 1949. [R. 4.] On June 8, 1949, petitioners filed a second motion for rehearing and supported it with a full statement of objections to the respondent's computation under Rule 50. In that statement they pointed out most of the errors shown above in the Tax Court's findings and opinion. On the same date they also filed a motion to set the said motion for rehearing on the calendar in Los Angeles for oral argument. These motions, however, were denied. [R. 5.]

Petitioners therefore made the "appropriate application that further hearing be had," referred to by the Supreme Court in the *Taylor* case. The Tax Court should have granted such a hearing here, should have disregarded the Commissioner's deficiency determinations, and should have made an independent redetermination of the net income of petitioners.

XII.

Petitioners' Gross Ignorance of Accounting and Income Tax Matters Cannot Be Made a Basis of Fraud.

As the statute reads, I. R. C., Sec. 293(b), a 50% penalty applies where "any part of any deficiency is due to fraud with intent to evade tax." The Tax Court determined that the petitioners were subject to that penalty. The Tax Court should have determined, on the contrary, that the Commissioner was guilty of negligence in failing to recognize and act upon the confused and stunted character of petitioner Rose's knowledge of accounting and business.

Rose, it is true, was an attorney. Petitioners ask this Court, however, to take judicial notice of the fact that prior to the most recent years accounting was not a prerequisite to nor a part of a course in law, nor was any knowledge of income taxes a prerequisite to or a part of a course in law; nor were any questions relating to these subjects contained in any Bar examination, including that of the State of California. A total lack of knowledge of accounting, income taxes and all practical aspects of business operation was wholly consistent with admission to the Bar and even success in many fields of that profession.

The Tax Court's own findings should have informed it that it had on its hands one who was a helpless infant in accounting and income tax matters. As the record shows, petitioner A. Brigham Rose was the sole attorney in this proceeding until February 7, 1949, when a motion

for rehearing was filed in the Tax Court. [R. 4.] No rehearing was granted. [R. 4, 5.] As the Tax Court found, petitioner Rose filed for the year 1938 a very strange return. It read as follows [R. 429]:

“From various interests and personally, have handled sum greatly in excess of \$5,000.00 for the taxable year of 1938, but have expended and borrowed a sum in excess of the amount handled, but unfortunately, the records requisite to rely on for details are not available to me for diverse reasons. I am, therefore, making this return: That I Owe Nothing, and will supplement this Income Tax Return on request.”

For the same year, Lori filed a return over the signature of petitioner Rose which merely recited the following [R. 448]:

“This corporation has gone into debt for the year 1938 and made no profits.”

It is thus obvious that Rose did not know the difference between income and receipts, or between expenses and disbursements, or between expenses and obligations. The Commissioner, as well as the Tax Court, was fully aware of that situation. Silvester Rocco was the revenue agent who investigated Rose's returns. [R. 34.] Here is a part of his testimony on cross-examination by Rose [R. 403]:

“Q. You never asked me about that I.A.T.S.E. fee? A. Mr. Rose, I asked you about—one time about that I.A.T.S.E. fee, and asked if you reported it. You very definitely told me you did not consider that to be income to be reported, because you had paid off your mortgage to save your property with that.”

Rocco answered further, in regard to the same fee [R. 404]:

“you were amazed to think I would ask you about that.”

The Tax Court summed it all up very aptly in its opinion as follows [R. 450]:

“Petitioner’s principal contention, which is totally lacking in merit, is that since most of the monies received were paid out in one way or another, without regard to the nature of the expenditures so far as tax deductions are concerned, that taxable income was no greater than that reported.”

Call that what you will, it is the very antithesis of fraud. Nowhere is there any evidence of the “elaborate artifice” which the Tax Court itself indicated as one of the elements of fraud. [R. 451.] In respect to accounting and income taxes, the condition or status of petitioner Rose may be described as abysmal ignorance, naiveté, or puerility. Clearly it was not fraud.

In *John B. Arnold v. Commissioner*, 14 B. T. A. 954, appeal dismissed, C. C. A. 8, 38 F. 2d 1011 (1930), the taxpayer was also an attorney. There the Board stated, at page 974:

“The system of accounting existing in the offices of the Arnolds at the time the fees began to come in was hopelessly inadequate, and to this inadequacy is to be charged a great portion of the confusion which has resulted. Because the Arnolds did not appreciate the necessity and importance of an adequate system of accounts, no thoroughgoing revision of the system was undertaken and an inadequate personnel was retained to maintain such accounts as were kept. There is, however, nothing to indicate that inadequate

records were maintained to the end that the amount of gross income actually derived be concealed.”

Again, in *Rickard v. Commissioner*, 15 B. T. A. 316 (1929), the Board stated, at page 317:

“Rickard kept no personal books, but believing that he would be obliged to incur legal expenses and possibly be required to pay fines as a result of the indictments which would equal the amount in his hands as profits of the motion picture venture, he did not return as income for 1921 the profits so received.

.

“Rickard’s belief that he would be called on to pay lawyer’s fees and fines constituted no valid reason for failure to report as income the profits so received. The expenditure had not been incurred and even if already expended such items would not have been deductible expenses.

.

“We do not agree, however, with respondent’s finding that Rickard was guilty of fraud with intent to evade tax. Since this case was heard after the Revenue Act of 1928 became effective, the burden of establishing fraud was on respondent. To establish fraud the production of clear and convincing evidence is necessary. The evidence fails to sustain the charge. Rickard acted ignorantly but without intent to defraud.”

Here there was confusion and inadequacy of records, and there was ignorance, gross and palpable ignorance. But such facts do not make a case of fraud.

Moreover, despite Rose’s ignorance in respect to accounting and income tax matters, his determinations of

net income represented substantial truth. The Tax Court rested its conclusion of fraud largely on certain financial statements submitted by petitioner Rose to the Citizens National Bank. [R. 444, 450-451.] It even went so far as to point out [R. 451] that the falsification of such statements is a crime under California law. Yet these very statements when properly interpreted, that is, adjusted from the accrual to the cash basis as we have heretofore in this brief, under Point II, instead of revealing any substantial understatement of income in petitioner's returns, in fact corroborate the correctness of the returns. As shown under Point II for the four years involved herein, the Commissioner determined the net income of petitioners Rose and his wife to total approximately \$117,000. The Tax Court reduced that total to approximately \$79,000. Apparently the Tax Court thought it had confirmation of that total in the net worth increase of \$75,000 shown by the financial statements referred to; also in the total income of \$85,000 shown in those financial statements for the four years. However, as also shown under Point II, when adjusted to a cash basis that total of income telescopes down to \$41,000. Assuming that figure to be correct, the total income shown in the petitioners' returns for those years represents a deviation from the correct figure of only \$4,000. Compared with the deviation of the Commissioner's figure, and of that found by the Tax Court, this deviation of \$4,000 could hardly be called error. Clearly it is not the work of one bent on fraud.

Conclusion.

Petitioners contend, in conclusion, that the Tax Court erred in each and all of the above respects; and that the decisions of the Tax Court should be reversed, with remand, if this Court deems necessary, in respect to any factual issues which must be resolved.

Respectfully submitted

GEORGE T. ALTMAN,

Attorney for Petitioners.

APPENDIX.

Provisions of Internal Revenue Code.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(1) DEPRECIATION.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) FRAUD.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

SEC. 711. EXCESS PROFITS NET INCOME.

* * * * *

(b) TAXABLE YEARS IN BASE PERIOD.—

(1) GENERAL RULE AND ADJUSTMENTS.—The excess profits net income for any taxable year subject to the Revenue Act of 1936 shall be the normal-tax net income, as defined in section 13(a) of such Act; and for any other taxable year beginning after December 31, 1937, and before January 1, 1940, shall be the special-class net income, as defined in section 14(a) of the applicable revenue law. In either case the following adjustments shall be made (for additional adjustments in case of certain reorganizations, see section 742(e)):

(A) Income Taxes.—The deduction for taxes shall be increased by an amount equal to the tax (not including the tax under section 102) for such taxable year under Title I or Chapter 1, as the case may be, of the revenue law applicable to such year [applicable to 1940 only];

(B) Long-Term Gains and Losses.—There shall be excluded long-term capital gains and losses. There shall be excluded the excess of gains from the sale or exchange of property held for more than eighteen months which is of a character which is subject to the allowance for depreciation provided in section 23(1) over the losses from the sale or exchange of such property;

(C) Income From Retirement or Discharge of Bonds, and So Forth.—There shall be excluded, in the case of any taxpayer, income derived from the retirement or discharge by the taxpayer of any bond, debenture, note, or certificate or other evidence of indebtedness, if the obligation of the taxpayer has been outstanding for more than eighteen months, including, in case the issuance was at a

premium, the amount includible in income for such year solely because of such retirement or discharge;

(D) Deductions on Account of Retirement or Discharge of Bonds, and So Forth.—If during the taxable year the taxpayer retires or discharges any bond, debenture, note, or certificate or other evidence of indebtedness, if the obligation of the taxpayer has been outstanding for more than eighteen months, the following deductions for such taxable year shall not be allowed:

(i) The deduction allowable under section 23(a) for expenses paid or incurred in connection with such retirement or discharge;

(ii) The deduction for losses allowable by reason of such retirement or discharge; and

(iii) In case the issuance was at a discount, the amount deductible for such year solely because of such retirement or discharge;

(E) Casualty, Demolition, and Similar Losses.—Deductions under section 23(f) for losses arising from fires, storms, shipwreck, or other casualty, or from theft, or arising from the demolition, abandonment, or loss of useful value of property, not compensated for by insurance or otherwise, shall not be allowed;

(F) Repayment of Processing Tax to Vendees.—The deduction under section 23(a), for any taxable year, for expenses shall be decreased by an amount which bears the same ratio to the amount deductible on account of any repayment or credit by the corporation to its vendee of any amount attributable to any tax under the Agricultural Adjustment Act of 1933, as amended, as the excess of the aggregate of the amounts so deductible in the base period over the aggregate of the amounts attributable to taxes

under such Act collected from its vendees which were includible in the corporation's gross income in the base period and which were not paid, bears to the aggregate of the amounts so deductible in the base period;

(G) Dividends Received.—The credit for dividends received shall apply, without limitation, to dividends on stock of domestic corporations;

(H) Payment of Judgments, and So Forth.—Deductions attributable to any claim, award, judgment, or decree against the taxpayer, or interest on any of the foregoing, if abnormal for the taxpayer, shall not be allowed, and if normal for the taxpayer, but in excess of 125 per centum of the average amount of such deductions in the four previous taxable years, shall be disallowed in an amount equal to such excess;

(I) Intangible Drilling and Development Costs.—Deductions attributable to intangible drilling and development costs paid or incurred in or for the drilling of wells or the preparation of wells for the production of oil or gas, and for development costs in the case of mines, if abnormal for the taxpayer, shall not be allowed, and if normal for the taxpayer, but in excess of 125 per centum of the average amount of such deductions in the four previous taxable years, shall be disallowed in an amount equal to such excess; and

(J) Abnormal Deductions.—Under regulations prescribed by the Commissioner, with the approval of the Secretary, for the determination, for the purposes of this subparagraph, of the classification of deductions—

(i) Deductions of any class shall not be allowed if deductions of such class were abnormal for the taxpayer, and

(ii) If the class of deductions was normal for the taxpayer, but the deductions of such class were in excess of 125 per centum of the average amount of deductions of such class for the four previous taxable years, they shall be disallowed in an amount equal to such excess.

(K) Rules for Application of Subparagraphs (H), (I) and (J). For the purposes of subparagraphs (H), (I), and (J)—

(i) If the taxpayer was not in existence for four previous taxable years, then such average amount specified in such subparagraphs shall be determined for the previous taxable years it was in existence and the succeeding taxable years which begin before the beginning of the taxpayer's second taxable year under this subchapter. If the number of such succeeding years is greater than the number necessary to obtain an aggregate of four taxable years there shall be omitted so many of such succeeding years, beginning with the last, as are necessary to reduce the aggregate to four.

(ii) Deductions shall not be disallowed under such subparagraphs unless the taxpayer establishes that the abnormality or excess is not a consequence of an increase in the gross income of the taxpayer in its base period or a decrease in the amount of some other deduction in its base period, and is not a consequence of a change at any time in the type, manner of operation, size, or condition of the business engaged in by the taxpayer.

(iii) The amount of deductions of any class to be disallowed under such subparagraphs with respect to

any taxable year shall not exceed the amount by which the deductions of such class for such taxable year exceed the deductions of such class for the taxable year for which the tax under this subchapter is being computed.

SEC. 713. EXCESS PROFITS CREDIT—BASED ON INCOME.

* * * * *

(f) AVERAGE BASE PERIOD NET INCOME—INCREASED EARNINGS IN LAST HALF OF BASE PERIOD.—The average base period net income determined under this subsection shall be determined as follows:

(1) By computing, for each of the taxable years of the taxpayer in its base period, the excess profits net income for such year, or the deficit in excess profits net income for such year;

(2) By computing for each half of the base period the aggregate of the excess profits net income for each of the taxable years in such half, reduced, if for one or more of such years there was a deficit in excess profits net income, by the sum of such deficits. For the purposes of such computation, if any taxable year is partly within each half of the base period there shall be allocated to the first half an amount of the excess profits net income or deficit in excess profits net income, as the case may be, for such taxable year, which bears the same ratio thereto as the number of months falling within such half bears to the entire number of months in such taxable year; and the remainder shall be allocated to the second half;

(3) If the amount ascertained under paragraph (2) for the second half is greater than the amount ascertained for the first half, by dividing the difference by two;

(4) By adding the amount ascertained under paragraph (3) to the amount ascertained under paragraph (2) for the second half of the base period;

(5) By dividing the amount found under paragraph (4) by the number of months in the second half of the base period and by multiplying the result by twelve;

(6) The amount ascertained under paragraph (5) shall be the average base period net income determined under this sub-section, except that the average base period net income determined under this subsection shall in no case be greater than the highest excess profits net income for any taxable year in the base period. For the purpose of such limitation if any taxable year is of less than twelve months, the excess profits net income for such taxable year shall be placed on an annual basis by multiplying by twelve and dividing by the number of months included in such taxable year.

No. 12,539

In the United States Court of Appeals
for the Ninth Circuit

A. BRIGHAM ROSE AND ZELLETTA ROSE; LORI, LTD.,
INCORPORATED; ZELLETTA M. ROSE AND
A. BRIGHAM ROSE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF
THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
S. DEE HANSON,
*Special Assistants to the Attorney
General.*

INDEX

	<i>Page</i>
Opinion below.....	1
Jurisdiction	1
Questions presented	3
Statutes and Regulations involved.....	5
Statement.....	6
Summary of argument.....	20
Argument:	
I. The Tax Court properly found, upon all the evidence, that the taxpayers failed to overcome in large part the <i>prima facie</i> correctness of the Commissioner's determination, based upon the net-worth method, of their net income and deficiencies for the taxable years involved.....	27
II. The Tax Court, for lack of proof, properly sustained the Commissioner's determination including the sums of \$10,000, \$1,456.76 and \$7,005.32 in taxpayer Rose's gross income for the years 1939, 1940 and 1941, respectively.....	36
III. Taxpayer Rose's financial statements, adjusted to the cash basis upon which the taxpayers' returns were filed, do not establish their returns to be correct as filed.....	41
IV. The Tax Court properly included in the community net income of taxpayers Rose and wife the value of their living quarters received rent-free from Lori during the taxable years	44
V. The Tax Court correctly included in taxpayer Rose's taxable income for 1938 his wife's one-half community share thereof..	46
VI. The Tax Court correctly found that the cost basis of taxpayer Rose's Silver King Coalition Mines stock, which he sold in 1941, was not in excess of \$4,500 at date of acquisition, as determined by the Commissioner.....	48
VII. The Tax Court properly sustained the Commissioner's determination allowing taxpayers Rose and wife deductions for depreciation on their Vine Street property only to the extent substantiated, and disallowed the remainder, together with Lori's claimed deductions for depreciation on its Villa Courts property, for lack of proof.....	54
VIII. The corporate identity of Lori may not properly be disregarded for income tax purposes.....	57
IX. The Tax Court properly sustained the Commissioner's determination disallowing, for lack of proof, Lori's claimed deductions for "related" business expenses paid by others.....	61
X. The Tax Court did not err in declining to exclude from Lori's income the sums aggregating \$8,156.76 allegedly representing Rose's personal loans deposited in Lori's bank account during 1939-1941, or the sums totaling \$3,955 allegedly representing Rose's moneys transferred from his accounts to Lori's account during those years but not income to Lori because they were not rentals allocable to Lori's Villa Courts property.....	66
A. The Tax Court properly sustained the Commissioner's determination including the sums totaling \$8,156.76 in Lori's taxable income for the years 1939 to 1941.....	67
B. The Tax Court correctly sustained the Commissioner's determination including the sums aggregating \$3,955 in Lori's taxable income for 1939 to 1941 as representing rentals allocable to its Villa Courts property.....	68
XI. Lori is not entitled to any excess profits credits in the determination of its excess profits tax liability for any of the taxable years involved.....	70

II

Argument—Continued:

XII. There is substantial evidence to support the Tax Court's findings sustaining the Commissioner's determinations of the 50% fraud penalties against the taxpayers for all taxable years involved because "any" of the deficiencies asserted for those years were due to fraud with intent to evade taxes....	75
Conclusion	84
Appendix	85

CITATIONS

Cases:

<i>Balestrieri, Joe, & Co. v. Commissioner</i> , 177 F. 2d 867.....	31, 46
<i>Bankers Coal Co. v. Burnet</i> , 287 U.S. 308.....	35, 72
<i>Battjes v. United States</i> , 172 F. 2d 1.....	80
<i>Belser v. Commissioner</i> , 174 F. 2d 386, certiorari denied, 338 U.S. 893.....	70
<i>Binder v. Welch</i> , 107 F. 2d 812.....	48
<i>Black v. Commissioner</i> , 114 F. 2d 355.....	47
<i>Blackwell Oil & Gas Co. v. Commissioner</i> , 60 F. 2d 257.....	66
<i>Brodella v. United States</i> , 184 F. 2d 823.....	32
<i>Burka v. Commissioner</i> , 179 F. 2d 483.....	31
<i>Burnet v. Clark</i> , 287 U.S. 410.....	60, 65, 66
<i>Burnet v. Commonwealth Imp. Co.</i> , 287 U.S. 413.....	60
<i>Burnet v. Houston</i> , 283 U.S. 223.....	36, 53
<i>Carmack v. Commissioner</i> , 183 F. 2d 1, certiorari denied, 340 U.S. 875	31, 32
<i>Chandler v. Commissioner</i> , 119 F. 2d 623.....	45, 46
<i>Chenango Textile Corp. v. Commissioner</i> , 148 F. 2d 296.....	66
<i>Christman Co. v. Commissioner</i> , 166 F. 2d 1016.....	36
<i>Cohen v. Commissioner</i> , 9 T.C. 1156.....	76, 83
<i>Cohen v. Commissioner</i> , 176 F. 2d 394.....	76, 80
<i>Commissioner v. Dyer</i> , 74 F. 2d 685, certiorari denied, 296 U.S. 586..	82
<i>Commissioner v. Erie Forge Co.</i> , 167 F. 2d 71.....	73
<i>Commissioner v. Harmon</i> , 323 U.S. 44.....	48
<i>Commissioner v. Plant</i> , 76 F. 2d 8.....	45
<i>Commissioner v. Sussman</i> , 102 F. 2d 919.....	73
<i>Commissioner v. West Production Co.</i> , 121 F. 2d 9, certiorari denied, 314 U.S. 682.....	72
<i>Dean v. Commissioner</i> , 9 T.C. 256.....	45
<i>Dalton v. Bowers</i> , 287 U.S. 404.....	60
<i>Denning, John L., & Co. v. Commissioner</i> , 180 F. 2d 288.....	60
<i>Deputy v. duPont</i> , 308 U.S. 488.....	65
<i>Eisenberg v. Commissioner</i> , 161 F. 2d 506, certiorari denied, 332 U.S. 767	83
<i>Elmhurst Cemetery Co. v. Commissioner</i> , 300 U.S. 37.....	46
<i>Fifth Street Bldg. v. Commissioner</i> , 77 F. 2d 605.....	73
<i>Friedman v. Delaney</i> , 171 F. 2d 269, certiorari denied, 336 U.S. 936..	65
<i>Gano v. Commissioner</i> , 19 B.T.A. 518.....	82
<i>General Utilities Co. v. Helvering</i> , 296 U.S. 200.....	42, 47, 58, 71
<i>Giurlani, A. & Bro. v. Commissioner</i> , 119 F. 2d 852.....	66
<i>Grace Bros. v. Commissioner</i> , 173 F. 2d 170.....	31
<i>Greenfeld v. Commissioner</i> , 165 F. 2d 318.....	76, 80
<i>Hague Estate v. Commissioner</i> , 132 F. 2d 775, certiorari denied, 318 U.S. 787.....	32, 54
<i>Halle v. Commissioner</i> , 175 F. 2d 500, certiorari denied, 338 U.S. 949	30, 31, 32, 34, 36, 76, 77, 80, 83
<i>Hanby v. Commissioner</i> , 67 F. 2d 125.....	42, 70
<i>Harris v. Commissioner</i> , 174 F. 2d 70.....	31, 76, 78, 80, 82, 83
<i>Harvey v. Commissioner</i> , 171 F. 2d 952.....	42, 47, 71, 73
<i>Hayes v. Commissioner</i> , 161 F. 2d 689.....	48
<i>Helvering v. Bruun</i> , 309 U.S. 461.....	36, 41, 53, 68, 70
<i>Helvering v. Gowran</i> , 302 U.S. 238.....	30

III

Cases—Continued:

	Page
<i>Helvering v. Kehoe</i> , 309 U.S. 277.....	76
<i>Helvering v. Mitchell</i> , 303 U.S. 391.....	76
<i>Helvering v. Salvage</i> , 297 U.S. 106.....	42, 47, 53, 58, 71
<i>Helvering v. Taylor</i> , 293 U.S. 507.....	36, 53, 74
<i>Heyman v. Commissioner</i> , 176 F. 2d 389, certiorari denied, 338 U.S. 904.....	76, 80, 83
<i>Higgins v. Smith</i> , 308 U.S. 473.....	59, 61
<i>Himmelfarb v. Commissioner</i> , 175 F. 2d 924, certiorari denied, 338 U.S. 860.....	83
<i>Hirsch v. Commissioner</i> , 124 F. 2d 24.....	31
<i>Hoefle v. Commissioner</i> , 114 F. 2d 713.....	32, 76, 80, 83
<i>Humphreys v. Commissioner</i> , 125 F. 2d 340, certiorari denied, 317 U.S. 637.....	80
<i>Interstate Transit Lines v. Commissioner</i> , 319 U.S. 590.....	41, 57, 60, 65, 68, 70
<i>Jelaza v. United States</i> , 179 F. 2d 202.....	32
<i>Kenney v. Commissioner</i> , 111 F. 2d 374.....	32
<i>Keokuk & Hamilton Bridge v. Commissioner</i> , 180 F. 2d 58.....	61
<i>Kitchen v. Commissioner</i> , 11 B.T.A. 855.....	45
<i>Knight-Campbell Music Co. v. Commissioner</i> , 155 F. 2d 837.....	65
<i>Lamb v. Smith</i> , 183 F. 2d 938.....	48
<i>Maddas v. Commissioner</i> , 114 F. 2d 548.....	80
<i>Malone v. United States</i> , 94 F. 2d 281, certiorari denied, 304 U.S. 562.....	83
<i>Mazzacone v. Commissioner</i> , decided May 20, 1948, affirmed, 175 F. 2d 778.....	31
<i>Minnesota Tea Co. v. Helvering</i> , 302 U.S. 609.....	66
<i>Mitchell v. Commissioner</i> , 89 F. 2d 873, reversed, 303 U.S. 391.....	80
<i>Moline Properties v. Commissioner</i> , 319 U.S. 436.....	58, 59
<i>Myres v. United States</i> , 174 F. 2d 329, certiorari denied, 338 U.S. 849.....	83
<i>National Carbide Corp. v. Commissioner</i> , 336 U.S. 422.....	59, 61
<i>National City Bank of New York v. Helvering</i> , 98 F. 2d 93.....	76, 80
<i>National Investors Corp. v. Hoey</i> , 144 F. 2d 466.....	59, 60
<i>Omaha Nat. Bank v. Commissioner</i> , 183 F. 2d 899.....	65, 66, 70
<i>O'Rourke v. Commissioner</i> , 81 F. 2d 668.....	48
<i>Paymer v. Commissioner</i> , 150 F. 2d 334.....	59
<i>Perry, J. M., & Co. v. Commissioner</i> , 120 F. 2d 123.....	57
<i>Phillips v. Dime Trust & S. D. Co.</i> , 284 U.S. 160.....	30
<i>Poe v. Seaborn</i> , 282 U.S. 101.....	47, 48
<i>Popular Priced T. Co. v. Commissioner</i> , 33 F. 2d 464.....	42, 71
<i>Roberts v. Commissioner</i> , 176 F. 2d 221.....	30, 31, 32, 41, 67, 70
<i>Rogan v. Star Piano Co., Pacific Division</i> , 139 F. 2d 671, certiorari denied, 322 U.S. 728.....	58, 60
<i>Rogers v. Commissioner</i> , 111 F. 2d 987.....	76, 80, 82, 83, 84
<i>Ruud v. American Packing & Provision Co.</i> , 177 F. 2d 538.....	46
<i>San Joaquin Brick Co. v. Commissioner</i> , 130 F. 2d 220.....	31, 41, 54, 57, 68, 70
<i>Seattle Hardware Co. v. Squire</i> , 181 F. 2d 188.....	61
<i>Seifert v. Commissioner</i> , 157 F. 2d 719.....	80, 82, 83
<i>Sooy v. Commissioner</i> , 40 F. 2d 634.....	73
<i>Spies v. United States</i> , 317 U.S. 492.....	30, 76
<i>State Consol. Oil Co. v. Commissioner</i> , 66 F. 2d 648, certiorari denied, 290 U.S. 704.....	73
<i>Stinnett v. United States</i> , 173 F. 2d 129, certiorari denied, 337 U.S. 957.....	31, 80
<i>United States v. Boston & M. R. Co.</i> , 279 U.S. 732.....	66
<i>United States v. Gypsum Co.</i> , 333 U.S. 364, rehearing denied, 333 U.S. 869.....	31, 76
<i>United States v. Hornstein</i> , 176 F. 2d 217.....	30
<i>United States v. Malcolm</i> , 282 U.S. 792.....	47
<i>United States v. Pettigrew</i> , 81 F. 2d 666.....	48
<i>United States v. Zimmerman</i> , 108 F. 2d 370.....	30
<i>United States v. Yellow Cab Co.</i> , 338 U.S. 338.....	46
<i>Watson v. Commissioner</i> , 124 F. 2d 437.....	60

IV

Cases—Continued:

	Page
<i>Welch v. Helvering</i> , 290 U.S. 111.....	30, 53, 57, 65
<i>Wickham v. Commissioner</i> , 65 F. 2d 527.....	77
<i>Wood v. United States</i> , 16 Pet. 342.....	83
<i>Zimmermann v. Commissioner</i> , 36 B.T.A. 618, set aside and re-manded, 100 F. 2d 1023.....	74

Statutes:

Deering's Penal Code of California (1949):

Sec. 532	42
Sec. 532a	42

Internal Revenue Code:

Sec. 21 (26 U.S.C. 1946 ed., Sec. 21)	27, 85
Sec. 22 (26 U.S.C. 1946 ed., Sec. 22)	27, 40, 45, 75, 85
Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	51, 55, 56, 62, 86
Sec. 24 (26 U.S.C. 1946 ed., Sec. 24)	34, 64, 87
Sec. 41 (26 U.S.C. 1946 ed., Sec. 41)	28, 30, 87
Sec. 42 (26 U.S.C. 1946 ed., Sec. 42)	28, 30, 87
Sec. 43 (26 U.S.C. 1946 ed., Sec. 43)	28, 30, 64, 88
Sec. 45 (26 U.S.C. 1946 ed., Sec. 45)	33, 88
Sec. 52 (26 U.S.C. 1946 ed., Sec. 52)	28, 30, 88
Sec. 54 (26 U.S.C. 1946 ed., Sec. 54)	28, 30, 70, 89
Sec. 113 (26 U.S.C. 1946 ed., Sec. 113)	49, 51, 53, 55, 56, 89
Sec. 114 (26 U.S.C. 1946 ed., Sec. 114)	55, 56, 89
Sec. 117 (26 U.S.C. 1946 ed., Sec. 117)	51, 89
Sec. 293 (26 U.S.C. 1946 ed., Sec. 293)	75, 79, 83, 90
Sec. 710 (26 U.S.C. 1940 ed., Sec. 710)	71
Sec. 711 (26 U.S.C. 1940 ed., Sec. 711)	71
Sec. 713 (26 U.S.C. 1940 ed., Sec. 713)	71
Sec. 1112 (26 U.S.C. 1946 ed., Sec. 1112)	79, 90
Sec. 1141 (26 U.S.C. 1946 ed., Supp. II, Sec. 1141).....	31, 76

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 23	64, 85
Sec. 51	48, 85

Miscellaneous:

Federal Rules of Civil Procedure, Rule 52.....	31, 76
I. T. 1530, I-2 Cum. Bull. 174 (1922).....	48
Min. 3853, X-1 Cum. Bull. 139 (1931).....	47
Rules of Practice before the Tax Court of the United States, Rule 50.....	35

Treasury Regulations 101:

Art. 22 (a)-1.....	93
Art. 22 (a)-3.....	93
Art. 23 (a)-1.....	93
Art. 23 (c)-1.....	64, 91
Art. 23 (l)-2.....	93
Art. 41-1.....	93
Art. 41-3.....	93
Art. 43-2.....	93
Art. 54-1.....	93

Treasury Regulations 103:

Sec. 19.22 (a)-1	40, 91
Sec. 19.22 (a)-3.....	40, 45, 91
Sec. 19.23 (a)-1	62, 65, 91
Sec. 19.23 (l)-2	55, 56, 91
Sec. 19.41-1	28, 30, 40, 45, 92
Sec. 19.41-3	28, 30, 70, 92
Sec. 19.43-2	30, 64, 92
Sec. 19.54-1	28, 30, 70, 93

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,539

A. BRIGHAM ROSE AND ZELLETTA ROSE; LORI, LTD.,
INCORPORATED; ZELLETTA M. ROSE AND
A. BRIGHAM ROSE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT ¹

*ON PETITION FOR REVIEW OF THE DECISIONS OF
THE TAX COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 426-455) are not officially reported.

JURISDICTION

The petition for review here involves deficiencies in individual income taxes and statutory additions thereto (50% fraud penalties) (R. 11-15, 506-510, 525-531); and corporate income, excess profits and declared-value excess profits taxes, 50% fraud penalties, and also 25% negli-

¹ This cause embraced four factually-related cases (T.C. Docket Nos. 5138, 5157, 11737 and 11738) which were consolidated for purposes of hearing, findings of fact and opinion in the Tax Court (R. 3, 22, 29-32, 83, 426-455; Pet. Br. 2), pursuant to the taxpayers' motion for consolidation of trial of all four cases, granted by the Tax Court on June 10, 1946 (R. 2; Tr. 13). The cases are brought here by the taxpayers' joint petition for review by this Court. (R. 541-546.) (The "Tr." references herein are to the documents in the original transcript of record on file in this Court.)

gence penalties (R. 468-479); all of which were asserted, variously, by the Commissioner against the several taxpayers for the taxable years 1938 to 1941, inclusive (R. 426-427, 436-440). The deficiencies were asserted by the Commissioner as follows: On March 3, 1944, the Commissioner mailed to the individual taxpayers, A. Brigham Rose and his wife, Zelletta Rose, a joint notice of deficiencies in income taxes and 50% fraud penalties in the respective sums of \$1,658.81 and \$829.41 for the calendar year 1940. (R. 11-15.) On March 7, 1944, he mailed to the corporate taxpayer, Lori, Ltd., Inc. (hereinafter called Lori, or the corporation), a statutory notice asserting deficiencies in income, excess profits and declared-value excess profits taxes, 50% fraud penalties, and also 25% negligence penalties in the aggregate sums of \$26,736.95 (taxes), \$13,368.50 (50% fraud penalties) and \$1,477.66 (25% negligence penalties), respectively, for the calendar years 1938 to 1941, inclusive. (R. 468-479.) In his answer filed in the Tax Court on July 24, 1944, the Commissioner alleged and asserted additional liability against Lori for 25% negligence penalties in the aggregate sum of \$3,052.35 for the taxable years 1938 and 1939—over and above those asserted for 1940 and 1941 in the statutory notice of March 7, 1944—for failure to have filed proper and adequate corporate income and excess-profits tax returns (Form 1120), as required by the statute and Regulations, for 1938 and 1939. (R. 479-491.) Finally, on May 9, 1946, the Commissioner mailed to the two individual taxpayers separate notices asserting deficiencies in income taxes against taxpayer Zelletta M. Rose in the aggregate sum of \$3,098.85 for the calendar years 1939 and 1941 (R. 506-510), and deficiencies in income taxes and 50% fraud penalties against taxpayer A. Brigham Rose in the total sum of \$5,891.45 and \$2,945.73, respectively, for the calendar years 1938, 1939 and 1941 (R. 525-531; Tr. 64, 74).

Within 90 days after the above-mentioned deficiency notices were mailed, the taxpayers filed with the Tax Court appropriate petitions for redetermination of such deficiencies in taxes and penalties on May 31, 1944, June 2, 1944,

and August 7, 1946, respectively (R. 7-15, 456-479, 498-510, 513-531), under the provisions of Section 272 of the Internal Revenue Code. Upon the taxpayers' submitting for the first time further data and evidence at the hearing of the cases, the Commissioner made various concessions and adjustments in their favor (R. 440, 445-446), as did the Tax Court upon still further new evidence being adduced by them (R. 440-441, 447, 449-450). Thereupon, upon giving effect to such adjustments (Tr. 35, 61, 71, 8), and denying the taxpayers' two motions for rehearing (R. 4-5; Tr. 31, 39), the decisions of the Tax Court sustaining in part the several deficiencies in question to the extent of \$16,866.17 (taxes) and \$9,279.43 (penalties) were entered on November 21, 1949. (R. 455-456, 497-498, 512-513, 540.) The cases are brought to this Court by the taxpayers' joint petition for review filed on February 17, 1950 (R. 541-546), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly found, upon all the evidence, that the taxpayers failed to meet the requisite burden of overcoming the *prima facie* correctness of the Commissioner's determination that, in the absence of adequate books or records, the amounts of their taxable net income realized for the years 1938 to 1941, inclusive, were—except to the extent of the adjustments made by the Tax Court upon the taxpayers' furnishing additional evidence at the hearing below—not less than the sums on which the several deficiencies were computed on the bases of the increases in the taxpayers' net worth for each of those years.

2. Whether the Tax Court erred in declining, for lack of proof, to exclude from taxpayer Rose's taxable income, as redetermined by it for the years 1939 to 1941, inclusive, the sums of \$10,000, \$1,456.76 and \$7,005.32, allegedly representing Rose's personal loans deposited in Lori's bank account, and other amounts (legal fee, \$6,500, and salary

from Lori, \$1,200) improperly included in his taxable income, for those years.

3. (This question not presented below): Whether taxpayer Rose's financial statements—adduced in evidence by the Commissioner for comparative purposes in respect of his determination of the taxpayers' increases in net worth for the taxable years—adjusted to the cash receipts and disbursements basis upon which the taxpayers' returns were filed, confirm the alleged truth and accuracy of their returns as filed.

4. Whether the Tax Court erred in including in the community net income of taxpayers Rose and wife the value of their living quarters which they received rent-free from Lori during the taxable years.

5. (This question not raised below): Whether the Tax Court erred in including his wife's one-half community share of his income in taxpayer Rose's taxable income for the year 1938, for which he filed a single return and she filed no return.

6. Whether the Tax Court correctly found that the basis of taxpayer Rose's Silver King Coalition Mines stock allowable for determining the long-term capital loss claimed by the taxpayers upon the sale thereof in 1941, was not greater than the sum of \$4,500 determined by the Commissioner as the cost thereof as of the date of acquisition.

7. Whether the Tax Court erred in sustaining the Commissioner's determination allowing taxpayer Rose and his wife deductions for depreciation on their Vine Street property only to the extent substantiated by them, and disallowing the remainder, together with Lori's claimed deductions for depreciation on its Villa Courts property, for lack of proof.

8. (This question not raised below): Whether the Tax Court properly recognized the corporate identity of the Lori corporation for income tax purposes.

9. Whether the Tax Court correctly sustained the Commissioner's determination disallowing, for lack of proof,

Lori's claimed deductions for 1938 and 1939 in the aggregate sums of \$10,748.62 and \$6,107.21, respectively, for "related expenses" paid by others out of funds received by them from Lori which in turn received "gross sums" from the Brevoort Enterprises, Inc., representing their combined unsegregated rental receipts under the joint leases of the Hotel and the Villa Courts held and operated by Brevoort and Lori, respectively.

10. Whether the Tax Court erred in declining, for lack of proof, to exclude from Lori's gross income the sums aggregating \$8,156.76, alleged by the taxpayers to have represented taxpayer Rose's individual loans deposited in Lori's bank account during 1939 to 1941, inclusive, and also the sums totaling \$3,955 purportedly representing Rose's moneys transferred from his bank accounts to Lori's accounts during those years but not being income to Lori because they were not rentals allocable to its Villa Courts property.

11. (This question not presented below): Whether taxpayer Lori is entitled to excess profits credits in the determination of its excess profits tax liability for any of the taxable years involved.

12. Whether the Tax Court properly found that the taxpayers failed to overcome, in large part, the presumptive correctness of the Commissioner's determinations of deficiencies and statutory additions thereto (50% fraud penalties) for the taxable years 1938 to 1941, inclusive, on the ground that the record as a whole indicates that the taxpayers filed fraudulent returns, and that they intended by their actions and omissions to evade taxes for each of those years, within the meaning of Section 293 (b) of the Revenue Act of 1938 and the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are printed in the Appendix, *infra*.

STATEMENT

The facts were found by the Tax Court as follows (R. 428-449):

The taxpayers A. Brigham Rose and Zelletta Rose are husband and wife domiciled in the State of California. (Hereinafter, A. Brigham Rose will be referred to as taxpayer Rose or Rose, unless otherwise indicated.) They filed their income tax returns for the years 1938 to 1941, inclusive, on a cash-calendar year basis, giving the address of taxpayer Rose's office at 205 South Broadway, Los Angeles, California. The returns were filed with the Collector for the Sixth District of California. (R. 428.)

Lori, Ltd., Incorporated, is a corporation organized under the laws of California in 1935, with its principal offices stated to be in the taxpayer's office. It was authorized by its charter to engage in general business activities, and did engage in the business of holding real estate. At all times material, taxpayer Rose was president and treasurer of Lori, and was in sole control of its operations. Without necessity of any additional authorization or any signature other than his own, he could withdraw funds from Lori's bank account. (R. 428.)

Of the six issued shares of stock of Lori, two were held by taxpayer Rose, two were issued in the name of Paul Angelillo, who was its vice-president, and was also an attorney associated with taxpayer Rose maintaining his office at the same address, and the remaining two shares were issued in the name of P. M. Woods, the stepfather of Mary Allen, who was a client of Rose. It was contemplated by Rose that additional shares of stock should be issued by Lori to him but this was never done. (R. 428-429.)

Taxpayer Rose and his wife came to California in 1927, at which time he was admitted to the Bar and commenced the practice of law. Since that time he has engaged in the practice of that profession in Los Angeles. (R. 429.)

Taxpayers Rose filed an income tax return, Form 1040,

for the year 1938, on which appeared, in addition to his name and address, only the following (R. 429):

From various interests and personally, have handled sum greatly in excess of \$5,000.00 for the taxable year of 1938, but have expended and borrowed a sum in excess of the amount handled, but unfortunately, the records requisite to rely on for details are not available to me for diverse reasons. I am, therefore, making this return: That I Owe Nothing, and will supplement this Income Tax Return on request.

Taxpayers Rose and his wife filed separate returns for the year 1939 on a community property basis. There was reported therein a net community loss of \$4,232.71 from rental property, and net income of \$10,312.55 from legal business. The total gross receipts from legal business were stated on the returns to be in the amount of \$17,154.78. The net community income reported on the returns of taxpayers Rose and his wife for the year 1939, after all deductions, was \$6,079.84. (R. 429-430.)

A joint tax return was filed by taxpayers Rose and his wife for the calendar year 1940, reporting net income of \$2,636.57. Included in that total was net income from his legal business amounting to \$1,411.66. (R. 430.)

For the year 1941 separate returns were filed by taxpayers Rose and his wife disclosing community receipts in the amount of \$29,719.76. Included therein was net profit from legal business of \$31,758.27. Deductions for contributions, interest, and bad debts aggregating \$729.56 were claimed. (R. 430.)

During the years 1938 and 1939 taxpayer Rose carried three checking accounts in his own name with the Citizens National Trust and Savings Bank of Los Angeles. Two of the accounts remained active through 1941. The accounts were designated: A. Brigham Rose, Attorney Account; A. Brigham Rose, Special Account, and A. Brigham Rose, Trustee Account. (R. 430.)

During those years, the balances, deposits, and withdrawals in these accounts were in the following amounts (R. 430-431):

	1938	1939	1940	1941
Balance 1/1	\$45.94	\$356.18	\$24.17	\$28.96
Deposits:				
A.B.R. (Atty. Acct.).....	\$880.00	\$1,449.50
A.B.R. (Spec. Acct.).....	28,715.84	16,738.66	\$7,458.74	\$7,966.00
A.B.R. (Trustee Acct.)....	14,058.11	12,461.10	8,559.35	5,298.00
Total.....	\$43,653.95	\$30,698.96	\$16,018.09	\$13,264.00
Withdrawals:				
	1938	1939	1940	1941
A.B.R. (Atty. Acct.).....	\$879.83	\$1,512.40
A.B.R. (Spec. Acct.).....	28,952.26	16,884.68	\$7,457.68	\$7,954.77
A.B.R. (Trustee Acct.)....	13,871.62	12,633.89	8,555.62	5,317.91
Total.....	\$43,343.71	\$31,030.97	\$16,013.30	\$13,272.68
Balance 12/31	\$356.18	\$24.17	\$28.96	\$20.28

Taxpayer Rose used all of these accounts, as well as the Lori account (R. 445, 446-447) for his personal deposits and expenditures, and the Lori account, in particular, was used as a "sanctuary" from his creditors who had on previous occasions attached his own accounts. (R. 431.)

During all of these years taxpayer Rose's principal sources of income were from his professional fees, from rents of property which he owned, and from certain real estate operations in which Lori was interested, the actual operations being handled during part of the period by Brevoort Enterprises, Inc. (hereinafter called Brevoort), a California corporation organized in 1935. (R. 431.)

Taxpayer Rose's interest in the real estate operations of Lori dates back to 1931, when he and his wife signed a note for \$12,000 to be held as additional security to the holder of a first trust deed covering a hotel structure consisting of 78 rooms located in Hollywood, which was then owned by the Hotel Investment Company, of which Rose was president and attorney. The first trust deed secured an obligation of approximately \$93,000. The management

of the hotel was conducted by one Robert L. Warner who was, at that time, connected by marriage to the family owning the stock of the Hotel Company, under leasing arrangement not shown in the record. At the rear and adjoining the hotel were nine bungalows known as the Villa Courts. These were originally acquired by a member of the family which at one time held the stock of Hotel Investment Company, were later transferred to that company, were then transferred to Warner, were later deeded to taxpayer Rose, and in 1935 were conveyed by him to Lori. (R. 431-432.)

At the time taxpayer Rose signed and executed the note for \$12,000, he was living in the hotel. Also, living in the hotel was one Mary Allen, for whom Rose drew a so-called spendthrift trust in 1932. Mary Allen was under the care of a nurse and was incompetent to handle her own affairs at that time. The corpus of the trust consisted of 30 railroad bonds and other securities, which she had obtained as the result of an action brought against members of her family, in which she was represented by taxpayer Rose. These securities were turned over to Warner, a business associate of Rose, who was named trustee to serve without bond. The trust was drawn by Rose as attorney for Mary Allen. In all matters in connection therewith Mary Allen acted under the advice of Rose until 1941. Shortly after the creation of this trust, Warner invested unspecified amounts of the trust funds in the hotel and Villa properties, and also in another adjoining property on Vine Street which was subject to a second mortgage held by taxpayer Rose. No accounting was made by Warner or requested of him by Rose, although Rose was attorney for Mary Allen, and was also financially involved in the operation of the hotel, the Villa Courts, and the Vine Street property. The investment of these funds by Warner in these various properties precipitated his resignation in 1935 after an investigation by Mary Allen's father.² At

² Not to be confused with P. M. Woods, previously referred to as Mary Allen's stepfather. About the latter (Woods) we know

about that time one Paul Angelillo, a lawyer associated with taxpayer Rose, acquired title to the hotel property and Rose as trustee acquired title to the Villa Courts which he then conveyed to Lori. Paul Angelillo conveyed the legal title to the hotel property to taxpayer Rose's wife in 1944. The Vine Street property was bought in by Rose personally in 1936 at a foreclosure sale involving a first mortgage thereon. Taxpayer Rose's bid at the foreclosure sale was \$22,100. This property included the land and three buildings. The hotel property, title to which was in Angelillo, and the Villa Courts, title to which was in Lori, were beneficially owned by Rose, subject to the encumbrances against them and the unliquidated claim of Mary (Allen) Woods against Rose, arising out of the trust of which she was beneficiary. Her claim was in 1941 formally recognized when Rose agreed to pay her \$200 a month during her life, which obligation was to be secured by mortgages covering the hotel properties and the Villa Courts, pursuant to a contract by which Rose agreed to cause Angelillo to mortgage the Hotel property and Lori to mortgage the Villa Courts. (R. 432-434.)

In 1938 taxpayer Rose appointed himself as trustee of the Mary Allen trust, but did not, at that time or later, transfer, or cause to be transferred to himself as trustee, any of the properties here involved. During all of the years involved Rose made certain payments to her, most of which the Commissioner allowed as deductions. (R. 434.)

In 1938 at least three accounts reflected proceeds from the operation of the hotel and courts. These were the so-called "Harry J. Wall, Special Account" at the Citizens

little except that he was a sailor and had died before the hearing herein (R. 433) on July 7-10, 1947 (R. 3).

The record shows that Mary Allen, also referred to, variously, in the testimony and exhibits and by the Tax Court as "Mary Woods", "Mary Allen Towle", and/or "Mary Allen Woods" (R. 73, 115, 118-124, 141, 297-301, 429, 432, 433, 443; Exs. 2, 3, 96), was Mary Allen Fuqua, "formerly known as Mary Allen" (R. 359; Ex. HH).

Bank, an account at that bank in the name of "Brevoort Enterprises, Inc.", and the bank account of Lori. Wall was manager of the hotel and Villa properties during 1938. During 1938 and 1939 taxpayer Rose also advanced funds from his own accounts for the operation of the hotel. (R. 434.)

Taxpayer Rose freely transferred funds between all of these accounts without maintaining any records or without making any segregation of income, expenditures, or indebtedness of himself or the various corporate entities. (R. 434.)

During 1938, Wall maintained certain receipts and disbursements records which disclosed receipts from the hotel and the Villa properties for that year in excess of \$40,000. For the month of January, 1938, the record differential between the income and the disbursements was \$785.79; for February \$1,175.78; for March \$601.05; for April \$359.96; for May \$556.72; for June \$888; for July \$199.92; for August \$536.36; for September \$349.22, and for October \$285.15. The various expenses of the operation through the month of April, 1938, were paid by checks written on the Wall account. This account became inactive in May, 1938, and thereafter many disbursements by check were made by taxpayer Rose from his special account. (R. 434-435.)

During all years material in these proceedings, taxpayer Rose had unrestricted use of all of the funds passing through the accounts of Brevoort and Lori. (R. 435.)

In February, 1939, Brevoort executed a five-year lease on the hotel and the Villa Courts to F. A. Linck. The lease provided for monthly payments of \$1,200 as rental and an advance payment of \$4,800 covering the last four months of the leasehold term. (R. 435.)

In May, 1940, Linck, in effect, surrendered the lease and a new lease contract was executed between Lori and Paul Angelillo as lessors on one hand, and G. W. Nickson and E. Sternglanz, as lessees, on the other, covering the re-

mainder of the term of the original lease. Under this new lease, all rentals were payable to taxpayer Rose and the new lessees were given credit for the \$4,800 advance payment theretofore made by Linck. It was also provided that the lessees were to be allowed \$100 a month as a rebate on their rent for a period of three years to cover improvements and repairs. (R. 435.)

The understanding effected between Rose, Lori and Angelillo was that of the receipts under the lease, one-third was to be credited to Lori and two-thirds to the hotel properties, title to which was in Angelillo's name held, however, for Rose's beneficial interest. This arrangement was carried out commencing in 1940. (R. 435-436.)

Because of the failure of the taxpayers to maintain any books and records of their income and expenditures, other than miscellaneous cancelled checks and loose receipts, the Commissioner found it necessary to reconstruct their taxable income by reference to bank deposits and other evidences of receipt of income for the years 1938 through 1941. (R. 436.)

At the time of the investigation of the income of the taxpayers, the Commissioner requested that taxpayer Rose furnish accounting or other records from which his income and the income of the various corporate entities could be determined. In response to this request, Rose presented only some cancelled checks and unclassified miscellaneous receipts. Thereafter, taxpayer Rose was required to appear in the Federal District Court in response to the Commissioner's order for the production of records. No additional significant information was forthcoming. None of the taxpayers maintained any books or records reflecting their income and disbursements, nor any other documents which adequately reflected this information for any of the years involved. (R. 436.)

The net income which formed the basis of the deficiencies in these proceedings was based upon a determination that all unidentified bank deposits were taxable receipts; that

payments made by taxpayer Rose to the hotel operating company represented loans to that company for operating expenses, and that personal and business expenses paid by taxpayer Rose by means of checks written on the Lori bank account constituted payments of constructive dividends taxable to him to the extent that they were not otherwise explained. The income so attributed to taxpayer Rose, as set forth in the deficiency notices, results from the computation of income and identifiable deductions (R. 436-437), as set forth in detail by the Tax Court in its findings (R. 438-439, 440, fn. (a)), and summarized as follows (R. 440):

	1938	1939	1940	1941
Net income per return.....	none	\$3,039.92	\$2,636.57	\$14,495.10
Net income from profession	\$8,172.55	8,195.90	3,905.22	(3,643.63)
	<hr/>	<hr/>	<hr/>	<hr/>
	\$8,172.55	\$11,235.82	\$6,541.79	\$10,851.47
Plus other net income additions	18,202.17	6,635.54	10,474.61	8,104.18
	<hr/>	<hr/>	<hr/>	<hr/>
Net income adjusted per statutory notices	\$26,374.72	\$17,871.36	\$17,016.40	\$18,955.65

* * * * *

By reason of identification of additional checks and other evidence subsequently made available by taxpayer Rose at the hearing, the Commissioner recognized that the community income as determined in the statutory notices should be reduced for the years 1938 and 1939 in the respective amounts of \$3,355 and \$2,565, representing returns of advances made by Rose to Brevoort. There should be further reductions of the sum of \$1,100 for 1938, and \$355 for 1939, reflecting the return by Lori to taxpayer Rose of advances on its behalf. (R. 440.)

In addition to the amounts allowed by the Commissioner (R. 440) as deductions in the notice of deficiency and the concessions and adjustments indicated in the paragraph above, taxpayer Rose established his right to decrease the

taxable income determined by the Commissioner in the following amounts (R. 441):

<i>1938</i>	
Interest	\$553.12
Transfers between accounts.....	638.00
Payments to Mary Allen	160.77
Payments to L. A. Wholesalers benefit.....	1,616.00
Current operating expenses of Lori and Hotel paid from bank accounts of Rose	10,748.62
<hr/>	
Total.....	\$13,716.51

<i>1939</i>	
Bank loans	\$500.00
Payments to Mary Allen.....	124.94
Transfers between accounts.....	355.00
Payments to L. A. Wholesalers benefit.....	285.00
Receipts under lease, properly accountable for by Lori and Hotel....	3,600.00
Current operating expenses of Lori and Hotel paid from bank accounts of Rose	6,107.21
<hr/>	
Total.....	\$10,972.15

<i>1940</i>	
Receipts under lease, properly accountable for by Lori and Hotel....	\$1,956.41

<i>1941</i>	
Receipts under lease, properly accountable for by Lori and Hotel....	\$3,485.00

The expenditures made by taxpayer Rose on behalf of Lori and the hotel operations were out of funds received by Rose from Lori. Lori, in turn, received gross sums from Brevoort covering both the hotel and Villa Court operations. By these expenditures Rose sought to and did thereby protect and preserve his equities in the various properties, the operations of which inured to his benefit. (R. 441.)

Taxpayer Rose's analysis of his bank deposits for 1938 reflected transfers from Lori's account of \$6,215 and of unidentified items aggregating \$22,283.43. For 1939, receipts from the Lori account totaled \$12,331.65, and the sum of \$8,247.31 was unidentified. For 1940, receipts from the Lori account were in the amount of \$4,476.90, and unidentified deposits were in the sum of \$9,069.78. For 1941, taxpayer Rose's analysis further revealed receipts from

the Lori account of \$4,229 and unidentified deposits totaling \$5,450. (R. 441-442.)

In the years 1939 and 1941 taxpayer Rose received substantial fees for his services in two cases, neither of which was deposited in his various bank accounts. The 1939 fee in the amount of \$17,500 was received for services in litigation involving the International Alliance of Theatrical and Stage Employees. Of this amount, \$6,500 was deposited in the account of Lori, and the balance was used generally for the payment of a mortgage held by the Occidental Life Insurance Company on the (Vine Street) property which taxpayer Rose had acquired in the foreclosure sale (in 1936). (R. 433, 442.)

In November, 1931, taxpayer Rose received a legal fee in the case of *Howard v. Howard* in the amount of \$26,727, which was paid to him in two checks. One check was cashed by Rose at his bank, but the proceeds were not deposited to his accounts. Another check in the amount of \$16,727 was deposited in the account of Lori. (R. 442.)

In addition to cash income, taxpayer Rose and his wife received from Brevoort, the hotel and Villa Court operators, in the year 1938, meals having a value of \$1,200, and received living quarters from Lori in the years 1938 through 1941, having a value of \$900 per year. (R. 442-443.)

In the year 1939 taxpayer Rose sold some stock in the Silver King Coalition Mines and claimed a gross long-term capital loss thereon in the community income tax returns. This stock was acquired by him as a result of a suit brought by Mary Allen involving a contest of the will of one Margaret Keith, an aunt of Mary Allen. As a result of this suit, Mary Allen was awarded 4,000 shares of stock in the Silver King Coalition Mines in the year 1934. All of the stock was apparently placed in the hands of Warner, who used it as security for making loans on the hotel property, which he managed in those years. Taxpayer Rose was entitled to a 50% fee on the recovery from the Keith Estate and at some subsequent date prior to 1936, 2,000 shares of such stock were acquired by him in lieu

of a cash fee. The inheritance tax on the assets received by Mary Allen from the Margaret Keith estate was paid in December, 1934, to obtain a release of the 4,000 shares of stock from the Probate Court. Two thousand shares obtained by Mary Allen were used to augment the original Mary Allen Trust and the remainder delivered to Rose at some later date. The 1,200 shares sold by Rose in 1941 represent a portion of this stock. The Commissioner allowed as a basis for this stock the amount of \$4,500, the maximum allowable therefore at the date of acquisition. (R. 443.)

Taxpayers Rose and his wife understated rental income received from property which he purchased at the foreclosure sale, by their failure to establish deductible expenses for depreciation applicable to that property in excess of the amounts allowed by the Commissioner. (R. 443-444.)

Taxpayers Rose and his wife failed to include in their income for 1938 and 1939 dividends received on stock of the Silver King Coalition Mines in the sum of \$420 for 1938, and in the sum of \$300 for 1939. Dividends were overstated in 1940 by the sum of \$3.76 for which the Commissioners in the statutory notices made appropriate adjustment. Also, appropriately adjusted by the Commissioner was a deduction in the amount of \$288.08 in the year 1940 for interest paid by taxpayer Rose. (R. 444.)

Taxpayers Rose and his wife failed to substantiate a deduction in the amount of \$150 claimed as contributions and a loss from bad debts in the amount of \$460 in the same year, both of which were disallowed by the Commissioner. (R. 444.)

In 1938, 1939, 1940 and 1942 taxpayer Rose submitted statements of financial condition to the Citizens Bank, in which he listed his assets, net worth, and annual income. These statements reflected the following information (R. 444):

<i>Date</i>	<i>Assets</i>	<i>Net Worth</i>	<i>Total Income</i>
6-11-38	\$119,800.00	\$103,000.00	\$13,500.00
4-29-39	140,900.00	124,400.00	In excess of 10,000.00
3- 1-40	140,000.00	135,000.00	In excess of 20,000.00
9-21-42	183,900.00	178,000.00	41,800.00

Any deficiencies in tax due from taxpayer Rose in the years 1938, 1939 and 1941 and from him and his wife in the year 1940, are due to fraud with intent to evade tax. (R. 444.)

During the years 1938 to 1941 the balances, deposits, and withdrawals of Lori's bank account were as follows (R. 445):

Total Deposits and Withdrawals From Bank Accounts of Lori, Ltd., Inc.,
for Years 1938-1941

	<i>1938</i>	<i>1939</i>
Bank balance Jan. 1.....	\$436.63	\$18.99
Total Deposits		
(per bank ledgers)	\$25,199.37	\$24,723.58
Total Withdrawals		
(per bank ledgers).....	25,617.01	23,678.53
Bank balance Dec. 31.....	18.99	897.38
	<i>1940</i>	<i>1941</i>
Bank balance Jan. 1.....	897.38	495.81
Total Deposits		
(per bank ledgers)	18,111.43	34,834.82
Total Withdrawals		
(per bank ledgers).....	18,513.00	35,289.58
Bank balance Dec. 31.....	495.81	41.05

In the absence of other evidence, the gross deposits in Lori's bank account for the years involved were assumed by the Commissioner to represent income to the corporate taxpayer, and in the statutory notice those deductions were allowed which could be substantiated by checks written by Lori. The deductions allowed were \$44.85 for 1938, \$734.83 for 1939, \$2,015.34 for 1940, \$2,307.98 plus \$16,727, representing a portion of a fee of taxpayer Rose deposited in Lori's account, for 1941. (R. 445.) Net income was determined to be as follows (R. 445):

1938	\$25,154.42
1939	23,988.75
1940	16,096.09
1941	15,799.84

The availability of additional data led the Commissioner to recognize and concede that Lori's net income as determined in the statutory notices was overstated for the years 1938 and 1939. (R. 446.)

For the year 1938 the overstatement was in the amount of \$6,371.39 comprising two items: (a) \$5,271.39 representing a deposit on November 7, 1938, which was the greater part of the proceeds of a \$7,000 loan to the taxpayers by the California Bank; (b) \$1,100 representing a transfer from the Rose Trustee Account on the same date. (R. 446.)

For the year 1939 there was overstatement of net income as shown in the statutory notice in the amount of \$15,821.51, composed of three general items: (a) \$8,966.51 representing transfers to Lori's account from the bank account of Brevoort and by the collection of rents from the lessee of the hotel and Villa properties; (b) \$355 representing four checks drawn on the A. B. Rose Trustee and Special Accounts as advances; (c) \$6,500 representing a portion of the fee paid to taxpayer Rose in 1939 in connection with the law suit brought against the International Alliance of Theatrical and Stage Employees. (R. 446.)

The Commissioner properly disallowed, as unsubstantiated, deductions claimed by Lori for the years 1939, 1940 and 1941 which were overstated in the purported corporate returns in the respective amounts of \$12,268.18, \$1,031.38 and \$1,503.92. (R. 446.)

Taxpayer Rose's analysis of Lori's bank deposits reflected the following (R. 446-447):

(a) For 1938, \$16,398.50 represented receipts from the hotel and Villa operations, and \$2,429.48 could not be identified;

(b) for 1939, \$6,505.26 represented receipts from operations and receipts under the Linck lease, and \$1,493.32 could not be accounted for;

(c) for 1940, the sum of \$8,930.92 was presumed to be proceeds from the lease of the hotel and the courts, and \$6,223.75 could not be identified;

(d) for 1941, the sum of \$8,355 was presumed to be proceeds of the lease, and \$2,167.50 could not be identified.

Lori's account was used during the years in question as a depository of substantial sums, in which it had no interest, including receipts from taxpayer Rose's law business and sums reflecting receipts from the hotel operations. (R. 445, 447.)

Additional adjustments have been established, as follows (R. 447):

1938

Paid to Wall for expenses of operation and to adjust gross receipts reflecting both Villa and hotel operations.....	\$9,295.00
---	------------

1940

Overstatement of receipts under lease properly allocable to hotel and not Lori.....	4,130.92
---	----------

1941

Overstatement of receipts under lease properly allocable to hotel and not Lori.....	3,955.00
Deposit of proceeds of personal loan of petitioner	2,605.32

Total	\$6,560.32
-------------	------------

Any deficiencies against Lori are due to fraud with intent to evade taxes. (R. 449.)

On the basis of the foregoing facts the Tax Court, sustaining in part the Commissioner's several determinations (R. 11-15, 468-479, 506-510, 525-531), found and held that, to the extent redetermined, the amounts of taxable net income in controversy had been properly determined by the Commissioner on the net worth basis from the several taxpayers' bank deposits and other evidence, and that the 50% fraud penalties (individual and corporate) were properly asserted by the Commissioner for all four taxable years involved³ (R. 449-455). The Tax Court thereupon

³ The Tax Court also decided adversely to Lori (R. 454-455), the issue involving the 25% negligence penalties imposed and redetermined against it (Tr. 61), under Section 291 of the Revenue Act of 1938 and the Internal Revenue Code, for failure to have filed adequate or any excess profits tax returns for the years 1938-

entered its several decisions accordingly (R. 455-456, 497-498, 512-513, 540), from which the taxpayers petitioned this Court for review (R. 541-546).

SUMMARY OF ARGUMENT

1. The taxpayers kept no books or accurate records during the taxable years from which their taxable income could be ascertained by the Commissioner, as they were required to do by law. Hence, the case is one in which the Commissioner and the Tax Court were compelled to determine their income as best they could from other evidence. In the absence of proper records, the Commissioner's determinations were *prima facie* correct, and the burden was on the taxpayers to prove by competent and relevant evidence that they were wrong, and that their *taxable* income was at least less than the amounts taxed. They have failed to meet such burden. The Commissioner determined and the Tax Court redetermined the taxpayers' income by ascertaining the total increases in their net worth, and adding thereto estimated reasonable amounts, not reflected in such increases, to cover their personal and living expenses. Such method of ascertaining income has been sustained many times by the courts. Moreover, the Tax Court's findings, upon all the evidence to the extent redetermining the Commissioner's determinations of the taxable income and deficiencies here, are fully supported by substantial evidence, and the taxpayers have not shown them to be clearly erroneous.

2. The taxpayers have not proved that the several items claimed to have been personal loans made by taxpayer Rose and currently deposited in Lori's bank account during the years 1939 to 1941, inclusive, constitute proper offsets against like or similar amounts disbursed by the corporation to him or for his account. Taxpayer Rose has not shown that such items were not properly included as

1941 (R. 427, 470). Since the taxpayers have furnished no argument in connection therewith, we have assumed that they have abandoned the issue.

income by the Commissioner in his determinations of Rose's deficiencies sustained by the Tax Court, that he did not owe Lori such amounts, that they did not represent taxable transactions, or that upon depositing them in Lori's account he did not thereafter draw checks in smaller amounts against such deposits for his own undisclosed purposes, as the record shows he did in innumerable other unidentified transactions, until the full amounts thereof were exhausted. Moreover, the record shows that the portion (\$6,500) of Rose's \$17,500 legal fee deposited in Lori's account in 1939, now complained of as improperly included in his taxable income for that year, was neither shown to have been deposited in any of his own bank accounts nor reported in his tax return for that year. Hence, he was properly charged therewith as taxable income for 1939. Likewise, the record shows that the remaining item of \$1,200 salary he received from Lori and reported as income for 1941, and now claimed as an exclusion from taxable income for that year, was allowed by the Commissioner and the Tax Court, as a reduction from income for salary previously reported in such amount as received from Lori, in the final redetermination of his income for that year.

3. (This issue was neither presented to nor considered by the Tax Court, and should therefore be passed by this Court.) Alternative discussion, if considered here: Taxpayer Rose's financial statements introduced in evidence by the Commissioner, upon adjustment to the cash basis upon which the taxpayers' returns were filed, clearly do not show, as the taxpayers insist, that their returns were correct as filed, and therefore that the Tax Court's redeterminations of their deficiencies in tax liability are erroneous. Such statements were not used by the Commissioner in corroboration of his determinations of the deficiencies involved, as the taxpayers state, but merely for *comparative* purposes as showing the taxpayers' phenomenal increase in wealth far beyond the aggregate net income and increases in net worth disclosed by them in their tax returns filed for the taxable years involved. As against the taxpayers' admitted total

income disclosed in such *certified* statements filed for credit purposes by taxpayer Rose, the Tax Court's redeterminations showed far less net income than did Rose's own statements for the period involved. Moreover, such statements, however adjusted, fail to show the taxpayers' returns to be correct as filed, and in any event they cannot change the result here whereby the Tax Court was obliged to redetermine the taxpayers' taxable net income as best it could in the absence of any accurate accounts and records.

4. The Tax Court, sustaining the Commissioner's determination, properly found upon the evidence that the value of the living quarters in Lori's Villa Courts property occupied rent-free by taxpayers Rose and his wife, was \$900 a year during the four taxable years involved here. Lori, though holding that property beneficially for Rose who had an "equity" therein, nevertheless legally owned and operated it while Rose and his wife pre-empted such living quarters without charge. If their free use thereof represented part compensation for Rose's services rendered to Lori during the taxable years, it nevertheless constituted taxable income to him whether or not received in the form of cash. The Tax Court, upon finding that the Commissioner's determination represented the reasonable value of the living quarters in question, was not bound, in the absence of convincing evidence to the contrary, to accept Rose's testimony of a lesser value of the *old* unimproved quarters before it was remodeled and improved into the newly-reconstructed living quarters occupied by taxpayer Rose and wife during the taxable years.

5. (This issue was neither raised nor considered below): The Tax Court properly included in taxpayer Rose's taxable income for 1938 his wife's one-half community share thereof, under the facts here. The record shows that Rose's wife filed no return for that year but that he filed a single return which the Commissioner treated as a joint return, and the Tax Court redetermined the taxpayers' *combined* community net income and tax liability on such basis accordingly. Moreover, so far as the record shows, the tax-

payers made no attempt to file separate returns for that year. Accordingly, under the decisions of this Court, taxpayer Rose is bound by his election to have filed a single return *jointly* for both himself and his wife for that year to the end that no part thereof is now excludible from his income as her community share.

6. The Tax Court correctly found, upon the evidence, that the cost basis of taxpayer Rose's Silver King Coalition Mines stock, sold in 1941, was not in excess of \$4,500 which, as determined by the Commissioner, was the maximum allowable at date of acquisition. The taxpayers have established neither the date of acquisition nor the cost of the stock at such date. They claim acquisition in 1936 but the Tax Court found, upon the evidence, that the stock was acquired at some date prior to that year, and the taxpayers have not shown this finding to be wrong. The record shows that it is correct for taxpayer Rose testified that he had acquired the *right*—and consequently the title—to the stock in 1934 but merely did not get physical possession of it until 1936. Accordingly, the Tax Court's redetermination, sustaining the Commissioner's determination, is correct. This alone should be sufficient to deny the taxpayers' contentions. Furthermore, however, the taxpayers have not shown the fair market value of the stock as of the *actual* date of acquisition in 1934. Taxpayer Rose testified that he was unable to obtain the necessary bank records to prove such value at the critical date, and that the value (\$9,600) which he used in his 1941 tax return admittedly did not represent the accurate figures but merely *a sort of generalization*. The revenue agent, on the other hand, testified that from the meagre evidence available, he had been unable to determine or verify that taxpayer Rose had paid any amount for the stock in question in excess of \$4,500, which was the amount used by the Commissioner in the statutory notice of deficiency for the taxable year involved.

7. The Tax Court properly sustained the Commissioner's determinations disallowing the taxpayers' claimed deductions for depreciation for lack of proof. As to the deprecia-

tion claimed on the Vine Street property by taxpayers Rose and wife, the record shows that the Commissioner allowed them deductions for depreciation therefor to the full extent established for the taxable years involved, and disallowed the remainder. In the absence of further substantiating evidence, the Tax Court had no basis to make further allowances upon redetermination of their community net income for those years. As to Lori's claim for depreciation on its Villa Courts property, the Commissioner disallowed the deductions taken therefor for lack of information establishing the bases upon which allowable depreciation could be determined. The taxpayers have furnished neither the cost bases of the buildings together with or separately from the land, nor any segregation as to what proportion of the aggregate depreciation claimed together by Lori and Brevoort for the Villa Courts and the hotel properties under joint lease, was allocable to the two properties, respectively. Hence, the Commissioner had no permissible bases upon which to determine the depreciation allowable thereon, if any, nor the Tax Court any alternative than to sustain his determination disallowing such depreciation for lack of proof. Moreover, there is no basis in law or the authorities for the taxpayers' novel contention that it was incumbent upon the Tax Court to make allowances for depreciation in their favor even though their evidence was admittedly unsatisfactory.

8. (This issue was not raised below) : The taxpayers have shown no persuasive or authentic reason why Lori, under the facts here, should be an exception to the general rule that the corporate identity should not be disregarded for income tax purposes. The evidence shows that Lori, instead of being a mere title-holder or agent for taxpayer Rose, was a corporation actively engaged in carrying on the business of holding and operating the Villa Courts properties at a profit during the taxable years. It leased its properties during those years, collected the rentals and paid the expenses of operation, borrowed large sums of money from time to time, and did many other things which constituted

corporate activity sufficient to serve a business purpose and to warrant this Court's holding that it was actively engaged in business during the taxable years. Consequently, its corporate identity should not be ignored for tax purposes.

9. The taxpayers have not established that Lori is entitled to the claimed deductions in the sums of \$10,748.62 and \$6,107.21 for the years 1938 and 1939 for "related expenses" paid on its behalf by taxpayer Rose from his bank accounts out of moneys he received from Lori which, in turn, had received *gross sums* from Brevoort representing *combined* unsegregated rentals received under the joint leases of Brevoort and Lori for the rental of their hotel and Villa Courts property, respectively. These sums were previously allowed taxpayer Rose by the Tax Court as offsets against his income for those years, upon his establishing that he had thereby paid from his bank accounts with moneys received from Lori and/or Brevoort, the current operating expenses of Lori and the hotel to such extent. There is no showing, however, that these amounts were not claimed and allowed in whole or in part as deductions to both Lori and Brevoort. The record shows that most of the items represented expenses of Brevoort's hotel operations, and to the extent which they may be allocable to Lori's Villa Courts properties, the taxpayers have failed to show any segregation of such expenses jointly paid for both such entities. Hence, there is no basis for their allowance by this Court as deductions to Lori. Moreover, there is no showing that the items in question were paid by taxpayer Rose on behalf of Lori, in excess of the amounts substantiated below and therefore conceded by the Commissioner and allowed by the Tax Court. Nor is there any showing, affirmatively, by the taxpayers, other than their own contentions, that the expenses represented by the items in question have not already been allowed in whole or in part by the Tax Court in reaching its redeterminations of Lori's taxable net income for 1938 and 1939.

10. The taxpayers have not established that the amounts claimed as exclusions from Lori's net income for 1939 to

1941, inclusive, represented taxpayer Rose's personal loans deposited in Lori's bank account during those years. Since these items are part of the same transactions in connection with which Rose claimed the exclusion of identical amounts from his taxable income for those years, they should not be excluded from Lori's income for the same reasons—lack of proof—heretofore shown in respect of their non-excludibility from Rose's income for those years. Moreover, the second group of three items is not excludible from Lori's income for the years 1939 to 1941, inclusive, for the taxpayers have not established that they represented merely funds transferred from Rose's bank accounts to Lori's account and not rental receipts from or allocable to Lori's Villa Courts properties. The Tax Court excluded from Lori's taxable income for those years so much of the items in question as the taxpayers were able to establish as representing transfers of personal loan moneys to it from Rose's accounts, understatements of lease receipts properly allocable to the Brevoort hotel and not to Lori's Villa Courts properties, etc., and disallowed the remaining items for lack of proof. So far as the record shows, however, the items in question represented additional rental receipts to Lori, and therefore they may not properly be excluded from its taxable income for the years involved here.

11. (This issue was not raised below): The record shows that Lori has failed to prove that it is entitled to the excess profits credits claimed in the determination of its excess profits tax liability for any of the taxable years involved. This point was raised for the first time in its objections (with alternative computations) filed to the Commissioner's recomputation of its tax liabilities submitted under Tax Court Rule 50 proceedings, pursuant to the Tax Court's opinion entered in this cause. That Rule prescribes the procedure for computing the correct deficiency for entry of the Tax Court's decision, after it has heard and decided all the issues *then* raised and presented on the merits, and requires that the hearing thereon must be confined strictly to a consideration of the correct computation of the defi-

ciency pursuant to the issues already decided, without argument or consideration given to *any new issues*. Hence, since the taxpayers presented no evidence enabling the Tax Court to have made the necessary findings in respect of the essential statutory “excess profits net income”, *only* from which the claimed “excess profits credits” were determinable, it is readily apparent that Lori’s claim for the excess profits credits can neither be properly raised now nor, if considered here, can it be allowed for lack of proof.

12. The Commissioner determined that the taxpayers were liable for the 50% fraud penalties because their tax returns as filed showed gross understatements and omissions of taxable income for all the taxable years involved. The Tax Court, sustaining the Commissioner’s determinations in part, specifically found, *upon the record as a whole*, that the taxpayers’ returns were false and fraudulent, and that *any* of the deficiencies asserted for each of the four taxable years was due to fraud with intent to evade taxes. Since the record fully supports these findings and the taxpayers have not shown them to be in any wise erroneous, the fraud penalties were properly imposed as provided by the statute.

ARGUMENT

I

The Tax Court properly found, upon all the evidence, that the taxpayers failed to overcome in large part the *prima facie* correctness of the Commissioner’s determination, based upon the net-worth method, of their net income and deficiencies for the taxable years involved.

During all the taxable years involved the taxpayers failed to report large amounts of their taxable net income, as required by the provisions of the applicable taxing Acts. Sections 21(a) and 22(a) of the Internal Revenue Code.⁴

⁴ Since the provisions of the Revenue Act of 1938 and the Internal Revenue Code involved herein are substantially the same, references thereto are, for convenience, to the Code only, unless otherwise specified. See explanations therefor under the statute and the Regulations, respectively, in the Appendix, *infra*.

(Appendix, *infra*). The statute provides that every individual and corporation subject to taxation thereunder shall make the necessary tax returns showing specifically all items of gross income, deductions, credits and such other information as may be necessary for a determination of their net income and tax liability. Sections 41, 42(a), 43, 52(a) and 54(a) of the Internal Revenue Code; Sections 19.41-1, 19.41-3 and 19.54-1 of Treasury Regulations 103 (Appendix, *infra*). The taxpayers failed to comply with these statutory requirements, and therefore the Commissioner asserted appropriate deficiencies against each of them for the taxable years involved. (R. 426-427.) Accordingly, the question presented in respect of each of the taxpayers is whether the Tax Court properly found, upon all the evidence, that they failed, in large part, to overcome the presumptive correctness of the Commissioner's determination that the amounts of their taxable income realized for the years 1938 to 1941, inclusive, were, on the basis of the increases ascertained in their net worth, not less than the sums upon which the respective deficiencies were computed. Determinative of the issue, generally, is the decision as to the *ownership* of the income in question. This, in turn, depends upon the correctness of the Commissioner's determinations—as redetermined by the Tax Court—that in the absence of any adequate books or records kept by the taxpayers, and based upon his reconstruction of their bank deposits as well as other evidence of their receipt of income, large amounts of unreported income were realized by the several taxpayers to the extent of the unexplained deposits in their various bank accounts during each of the taxable years involved.

As to the ownership of the income in question, it will be noted that one outstanding fact implicit in the entire record is that substantially all the income of Lori, Brevoort and the other corporate enterprises herein inured to taxpayer Rose's benefit individually, not only during the four taxable years but also thereafter. (R. 431-432, 435-436, 441-447.) It is noteworthy, moreover, as the Tax Court found (R. 450), that instead of refuting the Commissioner's de-

terminations in large part, the best the taxpayers were able to do—and this in their reply brief (Tr. 30)—was to conclude that as to each of them for each of the taxable years, they admittedly could not identify or explain substantial amounts of the deposits in the various bank accounts. Nevertheless, they contended, incongruously, that since most of their funds received during the taxable years were paid out indiscriminately without regard to the nature of the expenditures or segregation as to amounts and entities in so far as income tax deductions were concerned (R. 434, 436, 445, 447, 449), the amounts of their taxable income were no greater than those reported for each year. They insist, moreover, that their “returns were correct, or fairly so”, as filed for each of the taxable years (Br. 21); and they contend that because of the numerous gross errors in the Commissioner’s determinations as conceded by him—upon the taxpayers’ adducing additional evidence—in the Tax Court (R. 440-446), and as found by the Tax Court—upon their furnishing still further evidence—in respect of previously unexplained items (R. 441, 447), as well as those pointed out by the taxpayers here (Br. 4-5), the presumptive correctness of the Commissioner’s determinations was thereby overcome, and it was therefore incumbent upon the Tax Court, without more, to have *itself* redetermined their taxable net incomes for all years independently of the Commissioner’s determinations (Br. 37-39). There is no basis in the record for these contentions.

The Tax Court found, on the basis of the entire record, that except for the items which they were able to prove as not clearly representing realized income and the amounts which they established themselves entitled to as proper deductions (R. 440-441, 446-447), the taxpayers, upon whom rested the burden of proving error, failed to show that the amounts in question, as redetermined by it, were erroneous. Consequently, with the exceptions mentioned, it affirmed all the deficiencies in controversy. (R. 449-451.) The Tax Court’s findings to such effect are abundantly supported by the record. The Tax Court found that the taxpayers admittedly failed to keep any books or accurate records of

their income and expenditures for the taxable years, or any other documents adequately reflecting such information from which their correct income could be ascertained by the Commissioner (R. 434, 436, 445, 449-450), even though they were required by law to do so. Sections 41, 42 (a), 43, 52 (a) and 54 (a) of the Internal Revenue Code; Sections 19.41-1, 19.41-3, 19.43-2, and 19.54-1 of Treasury Regulations 103 (Appendix, *infra*). *Halle v. Commissioner*, 175 F. 2d 500, 502-503 (C.A. 2d), certiorari denied, 338 U.S. 949. In *Spies v. United States*, 317 U.S. 492, the Supreme Court stated that (p. 495):

The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures * * *. This system can function successfully only if those within and near taxable income keep and render true accounts.

But if the taxpayers "kept no books disclosing income and expenses * * * this can not be used as an excuse to escape the payment of income tax." *United States v. Zimmerman*, 108 F. 2d 370, 373 (C.A. 7th); *Roberts v. Commissioner*, 176 F. 2d 221 (C.A. 9th); *United States v. Hornstein*, 176 F. 2d 217, 220 (C.A. 7th). Accordingly, this is a case where the Commissioner and the Tax Court were compelled to ascertain and determine the taxpayer's taxable income as best they could from other evidence. In the absence of substantially *any* adequate records, the Commissioner had full authority to compute their income and determine their tax liabilities from whatever information and data he could find "in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." Section 41, Internal Revenue Code; Section 19.41-1, Treasury Regulations 103.

Moreover, contrary to the taxpayers' contentions (Br. 37-39), the Commissioner's determinations were *prima facie* correct, and the burden of proving them wrong and that the amounts of their *true* income were less than those which were taxed, was on the taxpayers. *Helvering v. Gowran*, 302 U.S. 238, 246; *Welch v. Helvering*, 290 U.S. 111, 115; *Phillips v. Dime Trust & S. D. Co.*, 284 U.S. 160, 167; *San*

Joaquin Brick Co. v. Commissioner, 130 F. 2d 220, 225 (C.A. 9th); *Hirsch v. Commissioner*, 124 F. 2d 24, 28 (C.A. 9th); *Carmack v. Commissioner*, 183 F. 2d 1, 2 (C.A. 5th), certiorari denied, 340 U.S. 875. Furthermore, the Tax Court's findings and conclusions—to the extent sustaining the Commissioner's determinations—are entitled to finality where, as here, they are supported by substantial evidence and are not shown to be "clearly erroneous". Rule 52 (a), Federal Rules of Civil Procedure;⁵ *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869; *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 873 (C.A. 9th); *Grace Bros. v. Commissioner*, 173 F. 2d 170 (C.A. 9th). Quite plainly, the taxpayers, upon this record, have not met the burden of showing that the Commissioner's determination, as redetermined by the Tax Court, or the Tax Court's findings, were wrong.

In many cases where taxpayers, engaged in business, have failed to keep proper books of accounts and records of income-producing transactions, the courts have sustained the Commissioner's determinations of income upon the basis of the increase in the taxpayer's net worth for each year under review, and adding thereto a reasonable estimated amount, not reflected in such increase, to cover personal and living expenses. *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C.A. 9th); *Carmack v. Commissioner*, 183 F. 2d 1 (C.A. 5th), certiorari denied, 340 U.S. 875; *Burka v. Commissioner*, 179 F. 2d 483, 484-485 (C.A. 4th); *Halle v. Commissioner*, 175 F. 2d 500, 503 (C.A. 2d), certiorari denied, 338 U.S. 949; *Mazzacone v. Commissioner*, decided May 20, 1948 (1948 P-H T.C. Memorandum Decisions, par. 48,084), affirmed *per curiam*, 175 F. 2d 778 (C.A. 3d); *Harris v. Commissioner*, 174 F. 2d 70 (C.A. 4th); *Stinnett v. United States*, 173 F. 2d 129 (C.A. 4th),

⁵ Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869, 991, provides that the Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury.

certiorari denied, 337 U.S. 957; *Jelaza v. United States*, 179 F. 2d 202, 203 (C.A. 4th); *Kenney v. Commissioner*, 111 F. 2d 374, 375 (C.A. 5th); *Hoefle v. Commissioner*, 114 F. 2d 713, 714 (C.A. 6th); *Brodella v. United States*, 184 F. 2d 823, 824-825 (C.A. 6th); *Hague Estate v. Commissioner*, 132 F. 2d 775, 777-778 (C.A. 2d), certiorari denied, 318 U.S. 787.

In *Roberts v. Commissioner*, 176 F. 2d 221, this Court held (p. 226) that:

The Tax Court was, therefore, right in sustaining the determination of the Commissioner. They were also correct in sustaining his determination as to the amount of the deficiency. *The petitioner had kept no books.* So the Tax Court had to determine the amount from such evidence as was presented to them. *If the result is an approximation, the lack of exactitude is traceable to the petitioner's own failure to keep accurate accounts.* [Italics supplied.]

To the same effect, see *Carmack v. Commissioner*, *supra*, p. 2; *Halle v. Commissioner*, *supra*, p. 503; and *Kenney v. Commissioner*, *supra*, p. 375.

Not only did the taxpayers fail to keep proper records as required by law, but also they afforded the Commissioner a minimum of cooperation during his protracted investigation of their tax returns for the four years involved. (R. 34-39, 400-403, 409-414, 436, 449.) In the absence of such records and assistance, however, the Commissioner determined the net worth of each of the taxpayers as of the beginning and end of each taxable year. (R. 436-440, 445; Exs. N, O and P.)⁶ He accomplished

⁶ All of the exhibits herein (Pet. Exs. 1 to 97, inclusive, and Resp. Exs. A to Z, and AA to JJ, both inclusive (Tr. 12)) were omitted from the printed record, as too bulky and costly to print, by order of this Court entered on June 29, 1950, pursuant to the taxpayers' motion, but they may nevertheless be referred to by the parties in briefing and argument of the cause (R. 565-567). While the taxpayers designated for printing specified portions of respondent's Exhibits R and S, and also of the petitioners' Exhibits 12 and 94 (R. 562-563), they do not appear to have been

this by reconstructing their various total bank deposits, less proper eliminations and cancelled checks showing allowable deductions (R. 405, 440, 445), together with other fragmentary evidence indicating the receipt of income and disbursement of substantial expenses, thereby arriving at their taxable income and deficiencies asserted for each of the four years involved (R. 33-81, 364-407, 436-442, 445-447). The resulting amounts of net income thus ascertained were based upon the determination that all unidentified and unexplained bank deposits represented taxable receipts, the payments made by taxpayer Rose to the Brevoort hotel operating company represented loans to that company for operating expenses, and that the personal and business expenses paid by him by means of checks written on Lori's bank account constituted constructive payments of dividends and distributions taxable to him to the extent that they were not otherwise explained. (R. 397-400, 436-440, 445; Exs. N, O and P.) The Commissioner was fully justified in doing this in order to determine the taxpayers' true income under his statutory authority to prevent evasion of taxes by closely allied taxable entities' arbitrarily shifting income and expense to suit their own purposes. Section 45, Internal Revenue Code (Appendix, *infra*).

Moreover, at the hearing below the taxpayers offered no satisfactory explanation for their failure to have kept proper records showing the segregation of items of receipts and disbursements of the several entities for the taxable years. (R. 449.) Nor did they make any successful effort to refute in large part, the presumptive correctness of the Commissioner's determinations of their net worth and the resulting net income and deficiencies for those years (R. 450), except to the extent conceded by the Commissioner and allowed by the Tax Court upon their furnishing addi-

included in the printed record. Since all the petitioners' exhibits are numbered and the respondent's lettered, the usual prefixal designations "Pet." and "Resp." have been omitted in references thereto.

tional evidence, as shown hereinafter. Such new evidence (including many exhibits), though unsatisfactory and contradictory, enabled the Tax Court to redetermine, to a degree, the proper figures and bases for the computation of the taxpayers' net income for the several years involved as nearly as possible from the meagre evidence and data then made available. (R. 440-444, 446-447, 449-450.)

As to the community net income of the individual taxpayers, Rose and his wife, the Commissioner subtracted from the increases in their net worth ascertained for each year all the allowable identified deductions, as business expenses, transfers between the various bank accounts, charge-back by the banks, divers and sundry payments to others, etc. He added thereto amounts considered reasonably sufficient to cover the taxpayers' personal, living and family expenses, not otherwise reflected in the computations. Section 24 (a) (1), Internal Revenue Code (Appendix, *infra*). He thereby, upon appropriate adjustments made, arrived at their community net income and the resulting deficiencies asserted for each year. (R. 397-400, 436-440, 442-443, 449-450; Ex. N.) In so doing, "No reasonable doubts were resolved against the taxpayer, while the audit and analysis made by the Commissioner seems to have been made as accurate as the circumstances here permitted." *Halle v. Commissioner*, 175 F. 2d 500, 502-503 (C.A. 2d), certiorari denied, 338 U.S. 949. It is significant, moreover, that the increases in the taxpayers' individual net worth and their total community net income as thus determined by the Commissioner ^{and redetermined by the Tax} for the taxable years, while substantial, were far less than those shown by taxpayer Rose himself in his annual statements of financial condition, submitted to his bank for credit purposes, covering substantially the same period involved here. (R. 444, 450-451; Ex. S; Pet. Br. 15-21.)⁷ As to the corporate taxpayer, Lori, the Commissioner, in the absence of any adequate records, determined that the amounts of the gross deposits, neither identified nor ex-

⁷ See also Point III, *infra*.

plained, in its bank account, less all deductions substantiated by cancelled checks written by Lori and other fragmentary evidence, represented taxable net income for which it was chargeable for the taxable years involved. (R. 445, 470-479.)

As to all the taxpayers, individual and corporate, upon their adducing for the first time at the hearing below additional evidence identifying more cancelled checks and furnishing other data not theretofore made available, the Commissioner recognized and conceded that the amounts of their net income, as originally determined, had been overstated for the years 1938 and 1939 in the total sums of \$7,375 for taxpayers Rose and wife, and \$22,192.90 for taxpayer Lori, respectively. (R. 440-441, 446.) In addition to such concessions by the Commissioner, moreover, the Tax Court found that the taxpayers had established by further new evidence that they were entitled to additional adjustments representing items theretofore unidentified and unexplained whereby the amounts of their net income, as previously determined by the Commissioner, were still further decreased by the aggregate sum of \$30,130.07 for taxpayers Rose and wife for all the taxable years, and by the total sum of \$19,986.24 for Lori for the years 1938, 1940 and 1941. (R. 440-441, 447, 450.) Full effect was thereupon given to all these concessions, adjustments and allowances—decreasing the taxpayers' income in the aggregate sums of \$37,505.07 and \$42,179.14 for taxpayers Rose and wife, and for Lori, respectively—in the Commissioner's recomputations submitted under Tax Court Rule 50,⁸ which resulted in overassessments of tax liabilities abated for each of the taxpayers for all taxable years involved. (Tr. 35, 61, 71, 81.)

These adjustments represented the *maximum* allowances possible by the Tax Court under *all* of the additional data

⁸ Rule 50 of the Rules of Practice before the Tax Court of the United States prescribes the procedure for computing the amount of the deficiency after the Tax Court has heard and decided all the issues raised and presented on the merits. *Bankers Coal Co. v. Burnet*, 287 U. S. 308.

and contradictory evidence adduced by the taxpayers. (R. 440-441, 446-447, 449-450.) The Tax Court found that they were necessary the more clearly to reflect the community net income of taxpayers Rose and wife in respect of the many transactions, identified and explained, involving Rose's deposits, withdrawals and checks written on Lori's bank account, as well as the taxable net income of Lori in respect of the many deposits made to its credit comprising funds properly accountable by and chargeable to others which did not represent income to Lori. (R. 450.) The remaining items which could not be explained by the taxpayers, however, were, for lack of proof, treated by the Tax Court as taxable income to them to the end that they were charged with only the *net* amounts to the extent unidentified or otherwise unexplained. (R. 440-441, 446-447.) *Helvering v. Bruun*, 309 U.S. 461, 467-468; *Helvering v. Taylor*, 293 U.S. 507, 514-515; *Burnet v. Houston*, 283 U.S. 223, 227-228; *Halle v. Commissioner, supra*, p. 503; *Christman Co. v. Commissioner*, 166 F. 2d 1016 (C.A. 6th). Notwithstanding these many liberal allowances on the basis of fragmentary and questionable evidence (R. 449-450), however, the taxpayers now complain of many additional items allegedly adjusted or disallowed improperly by the Tax Court (Br. 4-5, 10-37). (These are dealt with hereinafter, seriatim, under Points II-VII in respect of taxpayers Rose and wife, and Points VII-XI in respect of Lori.)

II

The Tax Court, for lack of proof, properly sustained the Commissioner's determination including the sums of \$10,000, \$1,456.76 and \$7,005.32 in taxpayer Rose's gross income for the years 1939, 1940 and 1941, respectively.

Taxpayer Rose contends (Br. 10-14) that the Tax Court erroneously failed to eliminate from his gross income, as determined by the Commissioner from the total dividends, gains and profits which he received from Lori during the taxable years 1939, 1940 and 1941 (R. 439), the respective sums of \$10,000, \$1,456.76 and \$7,005.32 allegedly repre-

senting Rose's borrowed moneys deposited in Lori's bank account during those years, the last amount including his salary of \$1,200 received from Lori in 1941 which he reported as income for that year. While he does not dispute the item of \$15,873.23 thus included in his income by the Commissioner and sustained by the Tax Court for 1938 (Pet. Br. 10, 14), he does claim that disbursements Lori made to him or for his account during 1939-1941 should be offset by the above sums, respectively, as allegedly representing his borrowed moneys even though deposited in Lori's account (Br. 12-14).

In so far as the record shows, the Tax Court had no basis whatever for making any additional adjustments for these unsubstantiated items. Their inclusion in the Commissioner's deficiency notices as income representing payments made by Lori to Rose for his personal purposes and benefit or as items unexplained, to the extent redetermined by the Tax Court, was not shown by the taxpayers to be wrong. (R. 439-442, 446-447, 449-450.)

It will be noted that all the items complained of—except the 1939 legal fee of \$6,500, and the 1941 salary of \$1,200—are claimed to have represented moneys borrowed by Rose individually and, for reasons undisclosed, deposited in Lori's bank account during 1939, 1940 and 1941 (Exs. R and 15), and therefore not chargeable to him (Br. 12-13). While the record indicates that Rose borrowed such sums and that like (or adjusted) amounts were concurrently deposited in Lori's account, there is no showing that they did not represent taxable transactions, that he did not owe Lori such amounts, or that upon depositing them in Lori's account he did not thereafter continue to draw checks in smaller amounts against such total deposits for his own purposes until the full amounts thereof were exhausted. The evidence shows that he did so continuously in connection with other equally unexplained transactions during the taxable years, both before and after the dates of the above deposits (R. 405-407, 431, 434, 435, 447; Exs. 12, 94,

95, R),⁹ and there is no showing whatever that he did not do so in respect of the several items here in question. That he did so in the case of the first item, \$2,000, borrowed and a like amount deposited in Lori's account on September 1, 1939 (Pet. Br. 12), for example, is shown by the fact that the final payment of interest (\$23.83) on such "loan" was made by check dated December 7, 1939, drawn by Rose *on Lori's account* for such amount (Ex. 12, p. 16, *et seq.*; Exs. 94, 95; Ex. R, pp. D-4 and D-5). As the record shows, Rose drew countless other checks on Lori's account for unexplained payments against equally unidentified deposits in Lori's account from time to time, as well as for large cash withdrawals therefrom for many of his own undisclosed purposes during the taxable years. (R. 434, 435, 445, 447; Exs. 12, 94, 95, R.) He furnishes no proof, however, that this was not done in respect of the several items here, nor any evidence whereby the many like or similar transactions, before and after the above deposits in Lori's account, can be traced or identified in respect to the "loans" and deposits here in question or otherwise. Nor can he, apparently, furnish such proof for the record shows that his personal and business funds **and** expenditures were inextricably intermingled with those of Lori and his other corporate enterprises from year to year, without any adequate records showing segregation of receipts and disbursements of the various taxable entities. (R. 431, 434-435, 441, 445, 447, 449-450.) In any event, taxpayer Rose has made no successful effort to establish affirmatively, other than by his own statements,

⁹ Exhibit 94 comprises large bundles of cancelled checks and miscellaneous charge slips purported by the taxpayers to show all payments made by Lori during the years 1939 to 1941, inclusive. (R. 293; Tr. 23, Schedule A, Part I, pp. 5-6.) Exhibit 95, supplementing Exhibit 94, constitutes the check book records of Lori containing check stubs and tabs purportedly showing Lori's total disbursements as listed thereon for the years 1937 to 1941, inclusive, and allegedly explaining all the checks missing from Exhibit 94, beginning with January 1, 1938. (R. 293-296; Tr. 23, Schedule A, Part I, p. 7.)

that the items in question have not already been allowed in whole or in part by the Commissioner and the Tax Court in reaching their determinations of his net income for the years 1939, 1940 and 1941. (R. 440-441; Tr. 35, 81.)

Moreover, the record shows that the legal fee complained of as improperly included in the sum of \$6,500 in Rose's 1939 income (Pet. Br. 12, 14), represented part of the \$17,500 total fee he received in 1939, of which he deposited \$6,500 in Lori's account in that year (R. 442, 446; Ex. 12, p. 15). Since the latter amount was neither deposited in any of his own various bank accounts (R. 442, 446) nor reported in his tax return for 1939 (Ex. F), he was properly charged therewith by the Commissioner and the Tax Court as taxable income for that year (R. 438, 527-528; Tr. 81, pp. 2-4). Finally, as to the remaining item, \$1,200, representing salary for 1941, Rose claims (Br. 13-14) a reduction in his gross income therefor on the ground that he received such amount from Lori and reported it in his 1941 return (Ex. G), but that the Commissioner allegedly failed to subtract it from his taxable income returned for that year (R. 529-531). While Rose did report such amount—which "Lori paid me as a retainer" (R. 400)—as part of his total net income of \$14,495.10 disclosed in his 1941 return (Ex. G; R. 529), nevertheless the record shows that the Commissioner used the latter amount (which included the \$1,200) as his starting point in making his determination of deficiency for that year (R. 529), and made allowance therefor as a reduction from 1941 income as " * * * salary from Lori assumed to be in deposits" (R. 438, 399-400; Ex. N). Hence, the \$1,200 item was properly excluded from Rose's 1941 taxable income as redetermined by the Tax Court for that year, pursuant to the Commissioner's recomputation under Rule 50 of the Tax Court submitted for entry of the Tax Court's decision for that year. (R. 446-447, 450, 529-531; Tr. 81, pp. 4-5.) Accordingly, full allowance has already been made for both of these items.

In these circumstances, it is quite plain that the Tax Court, in the absence of any showing that the foregoing

unexplained deposits represented mere repayment of Rose's personal loans previously made to Lori or other nontaxable transactions, as claimed, was obliged to treat them as taxable receipts and payments to Rose in so far as determined to be income in the deficiency notices. (R. 439; Pet. Br. 10-11.) This is no different from the endless other transactions involving checks and withdrawals for personal and business expenses—other than Lori's (R. 431, 447)—drawn by Rose on Lori's account which the Commissioner and the Tax Court were obliged, for lack of proof, to treat as constructive dividends and taxable distributions from Lori to Rose, to the extent not otherwise identified or explained (R. 397-400, 436-442, 446-447; Ex. N). Section 22 (e) of the Internal Revenue Code; Sections 19.22 (a)-1, 19.22 (a)-3 and 19.41-1 of Treasury Regulations 103 (Appendix, *infra*). Hence, the Tax Court treated such unexplained items as taxable income to Rose for the evidence in respect of the plethora of transactions and transfers between him, particularly, and the various other individuals and entities is so hopelessly confused that it is impossible—as this Court will find—to make any clear ascertainment and determination upon this record for the further allowances now claimed as offsetting items against the transfers from Lori to Rose. There is no *reliable* evidence in the record by which those transactions can be identified, traced, collated or related one with another. One thing is certain—the evidence in respect of most of Rose's loans as well as other transactions for *all* years is wholly insufficient to identify the many deposits made in his own accounts and/or in Lori's account, in amounts greater than those allowed by the Commissioner and the Tax Court. Consequently, to the extent that Rose deposited his "loans" in Lori's bank account, and retained the many receipts from Lori (as well as from his other enterprises) in his own bank accounts, without explaining or accounting therefor to anyone, much less the taxing authorities (R. 431, 435, 447, 516-517), it is clear that the Commissioner and in turn the Tax Court had no alternative than to treat them

as taxable income for lack of proof to the contrary¹⁰ (R. 430-431, 434, 435, 445, 447). Hence, this contention must fail. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593; *Helvering v. Bruun*, 309 U.S. 461, 467-468; *Roberts v. Commissioner*, 176 F.2d 221, 226 (C.A. 9th); *San Joaquin Brick Co. v. Commissioner*, 130 F.2d 220, 225 (C.A. 9th).

III

Taxpayer Rose's financial statements, adjusted to the cash basis upon which the taxpayers' returns were filed, do not establish their returns to be correct as filed.

The taxpayers contend further that the Commissioner's own evidence introduced for the purpose of "corroborating" his computations of their increases in net worth and taxable community net income based on bank deposits and disbursements, confirms the accuracy of their returns as filed for the four taxable years involved. (Br. 15-21.) The documents referred to comprised four statements of Rose's financial condition, covering substantially the same quadrennial period as here, which he submitted to his bank for credit purposes. (R. 444, 450-451; Ex. S; Pet. Br. 15-21.) The taxpayers state that these statements, adjusted to the cash basis in harmony with their tax returns filed on such basis, show a total net income of only approximately \$41,000 "on the basis of income data" (Br. 21), whereas they reported total community net income of \$37,706.61 for the four-year period involved (Br. 16-21).

First, this issue was neither alleged in the taxpayers' petitions for redetermination of the deficiencies involved (R. 7-10, 498-505, 513-524), nor was it presented to or con-

¹⁰ The taxpayers also contend (Br. 27-28) that five of the identical items—\$2,000, \$1,500, \$1,456.76, \$1,700 and \$1,500, totaling \$8,156.76 for the years 1939-1941—claimed here as excludible from Rose's income (Br. 12-14), should also be excluded from Lori's taxable income for those years, the allowance of which, of course, would permit all the taxpayers to avoid taxation thereon, even though not established as excludible from taxable income. This is dealt with hereinafter under Point X, in respect of Lori.

sidered by the Tax Court (R. 426-455). Neither was it assigned as error (R. 544-546), nor included in the taxpayers' statement of points intended to be relied on upon review (R. 549-560). Consequently, this Court is not called upon to decide the issue but, under the authorities, is duty bound to pass it. *Helvering v. Salvage*, 297 U.S. 106; *General Utilities Co. v. Helvering*, 296 U.S. 200, 206; *Harvey v. Commissioner*, 171 F.2d 952, 955 (C.A. 9th); *Popular Priced T. Co. v. Commissioner*, 33 F.2d 464 (C.A. 7th); *Hanby v. Commissioner*, 67 F.2d 125 (C.A. 4th).

Next, if this Court should nevertheless decide to consider the issue, we submit the following: Contrary to the taxpayers' contention that the statements in question were adduced in evidence by the Commissioner *in corroboration* of his determinations of their increases in net worth, the fact is, of course, that they were introduced merely for *comparative* purposes as showing the taxpayers' phenomenal increase in wealth (R. 444, 450-451; Ex. S, pp. A-3 and A-9), far beyond the aggregate income disclosed by taxpayer Rose and wife in their tax returns (Exs. E-J), as well as that redetermined by the Tax Court (Pet. Br. 20). The statements disclose an aggregate increase in taxpayer Rose's net worth of \$75,000 and total income of \$85,300 for the four-year period involved, and they were certified by taxpayer Rose "as being a full, true and correct statement of * * * [his] financial condition on the date given", and "to be true and correct to the best of my knowledge and belief."¹¹ (Ex. S, pp. A-3 to A-9; R. 444.) As against such admitted total income, the Tax Court redetermined the community net income of taxpayers Rose and wife to be only the total sum of \$79,540.06 for the

¹¹ It must be assumed, we submit, that taxpayer Rose's certified statements submitted to his own bank from year to year represented his *true* financial condition for the four-year period involved for, as the Tax Court pointed out (R. 450-451), the falsification of such statements constitutes a crime under California law. See Section 532 ("False Pretenses", etc.) and Section 532a ("False Financial Statements", etc.) of Deering's Penal Code of California (1949).

entire four years involved (R. 455-456, 512-513, 541; Pet. Br. 20). The taxpayers, however, departing from Rose's *certified* statements currently submitted to his bank during those years, reported only \$37,706.61 as their entire community net income for such period, a difference in excess of \$47,500 from that shown by the statements (Pet. Br. 20-21).

The taxpayers state (Br. 15-17) that these financial statements merely represented income earned and accrued but not *received*, and therefore not cash-basis income such as they reported; and upon being adjusted to such basis by eliminating the accounts receivable, they disclose substantially the same income as reported in their returns (Exs. E-J; Br. 19-21)—which they insist were correct or nearly so, as filed (Br. 21). This is not borne out by the record. Thus, the last of Rose's financial statements coming within the four-year taxable period involved here was the third one which he submitted to his bank on March 1, 1940. (R. 444; Pet. Br. 20.) Hence, that statement showing accounts receivable (less accounts payable of \$3,750) in the *net* sum of \$31,250, is evidence only of the receivables on that date but plainly not for the rest of the year 1940. Moreover, *no* accounts receivable are shown for the last taxable year (1941) involved here. (R. 444; Ex. S, p. A-7.) Quite plainly, therefore, the last statement Rose submitted to his bank on September 21, 1942, disclosing accounts receivable of \$50,000 *on that date*, does not establish or show *any* accounts receivable for the last taxable year involved here. (R. 444; Ex. S, p. A-9; Pet. Br. 15-21.) Even if adjustment of that statement to the cash basis would make any difference tax-wise, there is no such statement in evidence covering the last taxable year and, consequently, the record showing nothing to the contrary, the Tax Court's redetermination must stand as correct. Hence, in so far as the record shows, the taxpayers' returns grossly understating their taxable net income by more than \$41,800 (Br. 20), must necessarily be incorrect to such extent at least. In any event, the taxpayers' adjusting such statements to the cash basis in an attempt to establish the purported correct-

ness of their returns as filed (Br. 15-21), is not only futile but cannot change the result here. In these circumstances, it must be apparent even to the taxpayers that neither the Commissioner nor the Tax Court used the statements in question, other than comparatively, in the determination, on the net-worth basis, of their community net income for the taxable years involved.

IV

The Tax Court properly included in the community net income of taxpayers Rose and wife the value of their living quarters received rent-free from Lori during the taxable years.

The taxpayers contend (Br. 33) that since the Tax Court treated Rose as the beneficial owner of the Villa Courts property, it improperly included in his and his wife's community net income the rental value of their living quarters which they received rent-free from Lori during the taxable years 1938 to 1941, inclusive (R. 439, 442-443).

The record shows, however, that although the property was held by Lori beneficially for Rose (R. 433, 435-436), it was nevertheless legally owned and operated by Lori, just as several other properties were held and operated by other entities for his beneficial interest in order to accomplish his individual purposes (R. 56-57, 337, 432-436). Although Rose *assumed* the rights of ownership to Lori's property (as well as other properties) practically from the beginning, the evidence does not establish that he had acquired full title thereto until nearly the end of the last taxable year involved here—November 24, 1941—when by virtue of the contract whereby he, having already appropriated most of her assets, guaranteed Mary Allen an annuity of \$200 a month for life, he obtained the interest theretofore owned by her. (R. 318, 327-328, 432-436; Ex. HH.) Lori, therefore, as the real owner of the Villa Courts property, received and accounted for *its* one-third share, and the Brevoort hotel properties for its two-thirds share, of the total rentals realized by them from the joint leasing of the Villa Courts and the hotel, respectively. (R. 435-

436, 441, 446-447; Ex. 89.) The record shows that Rose *himself* considered that he had merely an "equity" in the Villa Courts property owned by Lori during the taxable years. (Ex. S, pp. A-7 and A-9; Pet. Br. 19, 22.) Since the evidence shows, however, that he had "sole control" over Lori at all times material here (R. 428), it is quite clear that Lori, though a corporation currently operating its Villa Courts property (R. 350, 441, 446-447), was in no position to exact its rightful rentals from Rose even though, as owner, it was chargeable for income tax purposes with the income from the property (R. 432, 433, 435-436; Exs. A-D). Consequently, the value of any free use of Lori's property pre-empted by taxpayers Rose and wife as living quarters constituted taxable income to them. Section 22 (a), Internal Revenue Code; Section 19.22 (a)-3, Treasury Regulations 103. Cf. *Chandler v. Commissioner*, 119 F.2d 623, 626-628 (C.A. 3d); *Kitchen v. Commissioner*, 11 B.T.A. 855; *Dean v. Commissioner*, 9 T.C. 256. If the free use of the living quarters represented part compensation for Rose's services rendered to Lori during the taxable years—for which he testified (R. 349) he felt that he was "entitled to collect as a fee"—it nevertheless constituted taxable income to him. Section 19.22(a)-3, Treasury Regulations 103. It was not necessary that it be paid in the form of cash to have constituted taxable income. Section 19.41-1, Treasury Regulations 103. Moreover, had the taxpayers not thus appropriated the living quarters without charge, it is not unreasonable to suppose that, the acute housing shortage considered, Lori would have received the equivalent of their unpaid rent, or more, from other tenants. *Commissioner v. Plant*, 76 F.2d 8 (C.A. 2d), relied on by the taxpayers (Br. 33) is distinguishable. There the court held merely that the beneficiary was not taxable on the nondistributable income of the trust used to maintain a residence for him, pursuant to the directions in the testator's will. That is not the situation here.

The only evidence bearing on this issue is Rose's own testimony that such quarters, formerly an "old" gym-

nasium and laundry which he estimated had a rental value of approximately \$30 a month, had been changed into the "Penthouse Villa" occupied by him and his wife without paying rent during the taxable years. (R. 303-304.) The Commissioner determined that such quarters represented value to the taxpayers of at least \$75 a month, or \$900 a year. (R. 15, 439; Ex. N.) While taxpayer Rose's testimony does not comport with the Commissioner's determination of the current reasonable rental value of like or similar living quarters in that area during the period involved, nevertheless the taxpayers offered no evidence with respect to other like or comparable apartments or living units in or near the Villa Courts property. The Tax Court was not bound to accept Rose's testimony in respect of the rental value of *old* unimproved quarters (R. 303), as being equivalent to that of newly-constructed living quarters. *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37, 40; *Joe Balestrieri & Co. v. Commissioner*, 177 F.2d 867, 873 (C.A. 9th). Hence, in the absence of any substantial evidence to the contrary, the Tax Court was warranted in finding, upon all the evidence, that the value of such living quarters was \$900 a year for each of the four years involved. (R. 442-443.) *United States v. Yellow Cab Co.*, 338 U.S. 338, 340-342; *Ruud v. American Packing & Provision Co.*, 177 F.2d 538, 540 (C.A. 9th). Accordingly, it is clear that there is no basis for the taxpayers' contention (Br. 33) that the rental value of the living quarters occupied by them without charge, is not includible in their taxable community net income. *Chandler v. Commissioner*, 119 F.2d 623, 626-628 (C.A. 3d).

V

The Tax Court correctly included in taxpayer Rose's taxable income for 1938 his wife's one-half community share thereof.

The taxpayers contend (Br. 34-35) that since Rose's income for 1938 was wholly community income, the Tax Court erred in including his wife's one-half community share of his earned income in his gross income for that year. The record shows that this issue was not raised below (R. 514-

518, 524), nor was it considered by the Tax Court (R. 426-455; Tr. 81). The Tax Court, therefore, had no opportunity to pass on it. Consequently, this Court should pass the point. *Helvering v. Salvage*, 297 U. S. 106; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206-207; *Harvey v. Commissioner*, 171 F. 2d 952, 955 (C.A. 9th). If this Court nevertheless decides to consider the point, the following is submitted:

The record shows that taxpayer Rose filed his return for 1938 disclosing no income or tax liability (R. 429, 526; Ex. F), and the Commissioner determined his total net income in the sum of \$26,374.72, of which \$8,172.55 represented his professional income (R. 440, 526-527). The Tax Court re-determined his total net income for that year to be \$8,203.21, the portion thereof representing professional income not appearing separately in the Commissioner's recomputation made pursuant to the Tax Court's decision. (Tr. 81.) The taxpayers insist that this was error because only one-half of Rose's professionally earned income (\$8,172.55) is taxable to him, and that therefore the remainder, being taxable as community net income to his wife who is not involved here, must be excluded from his income. (Br. 34-35.)

The rule that spouses domiciled in a State having the community property system of ownership of marital property may report one-half of the community income in separate returns, is not expressly stated in the taxing statute or the Regulations. It is nevertheless firmly established otherwise that they *may* thus divide and report their incomes and tax liabilities separately. Mim. 3853, X-1 Cum. Bull. 139 (1931); *Poe v. Seaborn*, 282 U.S. 101; *United States v. Malcolm*, 282 U.S. 792; *Black v. Commissioner*, 114 F. 2d 355, 358 (C.A. 9th). Where a single return is filed not on the community property basis, there is no showing of real intent on the part of the spouses to have filed on such basis, the total incomes have not been separated and the tax has been computed on the *combined* net community income, the return is taxable as a joint return, in the

absence of evidence clearly indicating an intention to have filed on the community basis, as here. I.T. 1530, I-2 Cum. Bull. 174 (1922). In these circumstances, since taxpayer Rose filed a single return without claiming any division of community income for 1938, which the Commissioner treated as a joint return (R. 58-59), and upon which the Tax Court redetermined the taxpayers' correct combined community net income and tax liability to the extent of the evidence available (R. 429; Tr. 81; Ex. E), the wife filed no return, and in so far as the record shows they made no attempt to file separate returns for 1938 (Br. 34-35), taxpayer Rose is bound by his election to have filed "a single return made by them jointly" for both himself and his wife for that year. Section 51 (b), Revenue Act of 1938 (Appendix, *infra*). See *Commissioner v. Harmon*, 323 U.S. 44; *Poe v. Seaborn*, *supra*; *Binder v. Welch*, 107 F. 2d 812, 814-815 (C.A. 9th); *United States v. Pettigrew*, 81 F. 2d 666 (C.A. 9th); *O'Rourke v. Commissioner*, 81 F. 2d 668 (C.A. 9th); *Lamb v. Smith*, 183 F. 2d 938, 943 (C.A. 3d); *Hayes v. Commissioner*, 161 F. 2d 689 (C.A. 10th). Accordingly, the taxpayers' claim for the exclusion of the wife's share of the community net income from Rose's taxable income, as redetermined by the Tax Court, should be denied.

VI

The Tax Court correctly found that the cost basis of taxpayer Rose's Silver King Coalition Mines stock, which he sold in 1941, was not in excess of \$4,500 at date of acquisition, as determined by the Commissioner.

The taxpayers contend (Br. 35-36) that the Tax Court erred in sustaining the Commissioner's determination that the cost basis of the 1,200 shares of stock of the Silver King Coalition Mines, which taxpayer Rose sold in 1941, was no greater than \$4,500, rather than the \$9,600 basis Rose claimed as the cost thereof for computing the long-term capital loss deducted on their 1941 returns (Exs. G. and J). The argument is that the \$4,500 basis used by the Commissioner and the Tax Court is wrong because that amount

represented merely the amount of a loan which Rose made against the stock in 1937, whereas he allegedly acquired it as a legal fee "in 1936" when it had a value of \$9,600. (Br. 35-36.) This contention is not borne out by the record.

The facts show that the taxpayers claimed the long-term capital loss deduction of \$5,547 on the basis of a cost of \$9,600 in 1936 and a selling price in 1941 of \$4,053 (\$4,140, less \$87 selling expense), that is, a community loss of \$2,773.50 each for 1941. (R. 508, 529-530; Exs. G. and J.) The Commissioner determined that the stock was acquired in 1937 at a cost of \$4,500, and therefore the loss in question was sustained in the sum of only \$447, of which one-half was deductible by each taxpayer Rose and his wife as a community loss for 1941. (R. 508-509, 529-530.) Section 113 (a), Internal Revenue Code (Appendix, *infra*). The Tax Court, though finding that the stock was acquired by taxpayer Rose *before 1936*, sustained such determination. (R. 439, 443.) Hence, there remain for decision both the date of acquisition and the cost of the stock as of that date.

The taxpayers' statement that the stock in question was actually acquired "in 1936" (Br. 35) is erroneous. In so far as the record shows, they have established neither the date of acquisition nor the cost of the stock at acquisition. (Br. 35-36.) Moreover, they have failed to show that the cost basis of \$4,500 determined by the Commissioner and the Tax Court is wrong. So far as the record shows, it is correct. Thus, the Tax Court found, upon the evidence, that taxpayer Rose acquired 2,000 shares of the stock in question "at some * * * date prior to 1936" (R. 443), in lieu of his 50% fee for the recovery of 4,000 shares thereof for Mary Allen in the will contest of her aunt's estate (R. 297-301), such shares having been released by the Probate Court upon Rose's intervention effecting payment of the California inheritance taxes thereon on December 8, 1934 (R. 297, 299, 443; Ex. 96). In so far as the record shows, *that* was the actual date when taxpayer Rose acquired the 2,000 shares of such stock (R. 297-301, 443; Tr. 22, p. 33), the 1,200 shares in controversy, sold by him in 1941, representing a

portion of the 2,000 shares then acquired (R. 297-301, 443; Ex. 96).

Taxpayer Rose stated under oath that he had acquired the stock in 1934, again in 1935, and finally in 1936.¹² (R. 297-301, 503, 523; Ex. G.) His testimony that he had "acquired the right to it in 1934" when Mary Allen's 4,000 shares were obtained from the Probate Court (R. 301), fixes the specific date of acquisition as December 8, 1934, when the Probate Court released the stock (Ex. 96). This is in harmony with taxpayer Rose's statement to the Tax Court (Tr. 22, pp. 33-34) that "the uncontradicted facts in the form of sworn testimony show that these shares of stock were acquired in 1934 as the result of a settlement in the Keith will contest"; but that "the actual possession of said shares by petitioner A. Brigham Rose was not accomplished until 1936". The record shows that the stock was in a single certificate of 4,000 shares, which was turned over to Warner as trustee of Mary Allen's trust—which he used, until later divided between Mary Allen and Rose, as security for making loans on Rose's properties (R. 299, 433, 443). The Probate Court nevertheless allocated 2,000 shares thereof to her which, due to parental objections, were diverted to trustee Warner to augment her trust, and it also

¹² Thus, taxpayer Rose testified, in answer to the question, "*** when did you acquire the stock?", that it was "In 1934" (R. 298, 299); and, in answer to the question, "You acquired the right to it in 1934?", he replied, "Yes, by a Court order in probate" (R. 301). Likewise, Rose represented to the Tax Court (Tr. 22, pp. 33, 34) that the sworn uncontradicted facts show that the stock was acquired in 1934 but that actual possession thereof was not obtained by him until 1936. He had testified in contradiction thereto, however, that he was unable to "determine just when this stock *** came into my possession, actually" (R. 115), although he had stated in his sworn 1941 income tax return that the "Date acquired *** [was] 1935" (Ex. G, Schedule F); and he later testified that, "I had acquired it *long prior to that time*" [1937], but that "I didn't get the *physical possession* of the stock until 1936, although it was awarded to us [Mary Allen and Rose] in 1934" (R. 298). (Italics supplied.)

ruled that Rose was entitled to his 2,000 shares because it recognized his contingent 50% cash fee contract with Mary Allen entitling him to one-half of whatever she should recover in the will contest of her aunt's estate (R. 299-301). Hence, Rose clearly *acquired title* to his 2,000 shares in 1934 even though the certificate "wasn't separated until later" (R. 300) when Rose got *physical possession* of his shares in 1936 (R. 299). Consequently, the Tax Court's finding that taxpayer Rose acquired the 1,200 shares of stock here in question at some unshown date *prior to* 1936 (R. 443), is correct, and taxpayer Rose's statement to this Court that he "actually acquired" the stock as a fee "in 1936" (Br. 35), is necessarily incorrect. Hence, this in itself should be sufficient to defeat the taxpayer's contentions for their alleged value of \$9,600 as of 1936 can have no application as the statutory cost basis for determining the claimed long-term capital loss which, to be deductible, must be the cost in the *actual* year of acquisition—1934 here. Sections 23 (g) (1), 113 (a) and 117 (a) (1), (5) and (9) and (b), Internal Revenue Code (Appendix, *infra*).

Nor have the taxpayers established the cost or fair market value of the 1,200 shares of stock in question as of the date of *actual* acquisition. Contrary to their erroneous statement (Br. 36), the Tax Court, while stating that it could not take the responsibility of acting as counsel for either of the parties, nevertheless admonished taxpayer Rose that he should develop more fully the "tax basis * * * for determining gain or loss with regard to that stock" in question (R. 347), and that "the important thing is the fair market value of this stock as of the time you obtained title to it" (R. 348). In response thereto, however, taxpayer Rose failed to specify or *prove* such value. He merely testified that he had used the value of \$8 a share (aggregating \$9,600 for 1,200 shares) for the purpose of reporting the long-term capital loss claimed in his 1941 return because he was unable to obtain the necessary records and information from his bank to prove the real value of the stock as of the date of acquisition. (R. 297-298, 347-348; Ex. G.) More-

over, showing his *inability* to establish such value as of the critical date, taxpayer Rose testified that "I can't find these bank records which would show what [value] it was put up for [sale] * * *, so I took * * * The time it did come into my hands, [and] to the best of my recollection, looking back there [at time of acquisition], the stock was worth about \$8.00" a share; "So I submitted that figure in my [1941] income tax return. In other words * * * I am not presenting to you the accurate figures. It was merely a sort of a generalization." (R. 348.)

On the other hand, the record shows the fair market value of the stock at acquisition to have been not more than the sum of \$4,500, as determined by the Commissioner and the Tax Court. (R. 79-81.) Thus, Revenue Agent Rocco testified that the records of stock brokers J. A. Hogle and Company showed that "in lieu of a basis of \$9,600 * * * the acquisition of that stock [was] for the sum of \$4,500". (R. 79.) While the taxpayers here, as in the Tax Court (R. 80, 298; Tr. 22, pp. 33-34), insist that the latter amount represented merely the amount of a loan which Rose had made against the stock in 1937 (Br. 35), nevertheless, as shown, they have failed to establish any other amount as the cost *at acquisition* in 1934. As against this, Revenue Agent Rocco testified that while he had never been able to verify exactly what the cost basis of the stock would have been in the year of acquisition, other than as shown by the stock brokers' records (R. 81), neither had he "been able to determine or verify from any records that Mr. Rose paid [an amount] for this stock in excess of the \$4,500.00 which is used in the statutory notice" for 1941. (R. 80, 81, 529-530.) Hence, the determination of the Commissioner and the Tax Court of the \$4,500 cost basis was the nearest possible cost figure ascertainable under the conflicting evidence adduced by the taxpayers.¹³ In these circumstances, it is

¹³ Taxpayer Rose's conflicting testimony showed alleged values of the stock in question from time to time, variously, as follows: \$10 a share as of Mary Allen's decedent aunt's death (R. 80, 297, 348); "about" \$8 a share at "The time it did come into my hands"

clear that in the absence of their establishing either the date of acquisition or that the fair market value *at date of receipt* was in excess of the amount allowed by the Commissioner, the Tax Court, for lack of proof, had no alternative than to find that the cost basis as determined by the Commissioner was "the maximum allowable therefor at the date of acquisition." (R. 443.) Section 113 (a), Internal Revenue Code. It follows that the taxpayers' failure or inability to prove these essential material facts leaves them, upon whom that burden rests, with an unenforceable claim. *Helvering v. Bruun*, 309 U. S. 461, 467-468; *Burnet v. Houston*, 283 U. S. 223, 227-228; *Helvering v. Taylor*, 293 U. S. 507, 514-515.

Helvering v. Salvage, 297 U. S. 106, relied on by the taxpayers (Br. 35-36), is not at variance with the Tax Court's findings here for there the basis of the stock at date of acquisition was shown by the evidence. Neither does *Helvering v. Taylor*, *supra*, support their contention (Br. 36) that since the Commissioner, upon rejecting their cost basis of \$9,600 shown in their 1941 return (Ex. G), did not ascertain a "substituted" valuation at date of acquisition of the stock differently from his original determination, the Tax Court erred in merely adopting such determination instead of its independently redetermining another valuation—presumably without further evidence adduced by the taxpayers (Br. 36). This novel contention—despite the Tax Court's admonition to taxpayer Rose that *he* had the burden of proof on the material facts (R. 347-348)—would be tantamount to shifting the burden from the taxpayers to the Commissioner, and even to the Tax Court. As shown, this is directly contrary to the authorities. *Welch v. Helvering*,

(R. 348) (which he claims as 1936 (Br. 35)); \$8 a share when he prepared his 1941 income tax return (R. 297; Ex. G); \$3, plus, a share "in the year '39, [when I] sold [such stock] for three dollars and something" (R. 296); and finally, \$8 a share, the figure he used in his 1941 tax return which admittedly did not represent "the accurate figures" but "merely a sort of a generalization" (R. 348).

290 U. S. 111, 115; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C.A. 9th). In any event, the *Taylor* case is readily distinguishable for there the Supreme Court held that no opportunity had been afforded the taxpayer to adduce evidence before the Board of Tax Appeals, and to try the case on the merits and on the correct theory. Only for that reason, absent here, was the rehearing deemed necessary there. While the taxpayers, of course, are not compelled under that decision to show what "the correct amount of the tax" is, they "must however show in some way at least that the tax imposed is erroneous", and "The failure to do so in this instance leaves the redeterminations made by the Tax Court those which should be given effect." *Hague Estate v. Commissioner*, 132 F. 2d 775, 778 (C.A. 2d), certiorari denied, 318 U. S. 787.

VII

The Tax Court properly sustained the Commissioner's determination allowing taxpayers Rose and wife deductions for depreciation on their Vine Street property only to the extent substantiated, and disallowed the remainder, together with Lori's claimed deductions for depreciation on its Villa Courts property, for lack of proof.

The taxpayers contend (Br. 37) that while the rentals received during the taxable years were included in Rose's and Lori's gross income, they were not allowed *any* deductions for depreciation on the buildings of their Vine Street property or the Villa Courts property owned by them, respectively, from which they derived such rentals. They assert this as error on the ground that it was the alleged duty of the Tax Court to redetermine the allowances for depreciation "even if the petitioners' evidence was unsatisfactory". (Br. 37.) There is no basis for this contention.

The taxpayers' statement (Br. 37) that neither the Commissioner nor the Tax Court allowed taxpayers Rose and wife "any" depreciation, is erroneous. It will be noted that the taxpayers reported no income and claimed no deductions for depreciation or otherwise in their return filed for 1938. (R. 526-527; Ex. E.) Nor is any additional

depreciation for the other taxable years, over and above that allowed by the Commissioner and the Tax Court, shown to have been claimed or established at the hearing below. (R. 443-444; 450; Tr. 22, 30.) The record shows that the Commissioner allowed taxpayers Rose and wife deductions for depreciation to the full extent established for the years 1939 to 1941, inclusive, and properly disallowed the remaining amounts for lack of proof. (R. 13-14, 57-58, 439, 527-528, 529.) The Tax Court found, upon the evidence, that they had understated their rental income received from the Vine Street property (comprising land and three buildings), purchased by Rose in 1936 for \$22,100 (R. 433), because of their failure to have established any *deductible* expenses for depreciation applicable thereto, in excess of the amounts allowed by the Commissioner (R. 443-444). Since the maximum basis allowable for depreciation purposes is limited to the cost of the buildings, less that of the land (Section 19.23 (1)-2, Treasury Regulations 103 (Appendix, *infra*)), the Commissioner allocated the total cost between the depreciable and the non-depreciable assets, and thereupon determined the depreciable basis of \$21,000 for the buildings, and allowed depreciation deductions accordingly as provided by law (Sections 23 (1) and (n), 113 (a) and 114 (a), Internal Revenue Code (Appendix, *infra*)), (R. 14, 58, 439, 528-529). In these circumstances, the Tax Court's findings (R. 439, 443-444), upon the only evidence available, sustaining the Commissioner's determinations, should be affirmed.

As to Lori's depreciation claimed on its Villa Courts property (comprising nine bungalows and a dining room) (R. 432-433, 435-436), the record shows that the Commissioner disallowed the deductions taken therefor for lack of information upon the basis of which allowable depreciation could be determined (R. 473, 475, 477). Quite plainly, if Lori was entitled to depreciation deductions on that property or other depreciable assets for any of the taxable years involved, therefore, it has shown neither records nor other acceptable evidence that it owned depre-

cial assets having a cost value of \$32,000¹⁴, as claimed in its 1940 and 1941 returns. (R. 464; Exs. C and D.) It deducted depreciation in its 1939 return in the sum of \$2,500 which presumably represented depreciation claimed without segregation shown, for both the Brevoort hotel and the Villa Courts properties then under joint lease to Linck. (R. 124, 461-462, 473; Exs. B and Q.) On the other hand, it claimed only \$640 depreciation in its returns for each 1940 and 1941 (R. 475, 477; Exs. C and D), without any showing of the depreciable bases therefor. Since Lori's Villa Courts property and the Brevoort hotel were under a joint five-year lease to Linck from February, 1939, to May, 1940, and thereafter under joint lease to others during the rest of that year and all of 1941 and later years (R. 435, 461-462, 463; Exs. Q and 89), there is no showing of any bases or segregation as to what proportion of the aggregate depreciation claimed and deducted for the *two* properties was allocable to Lori's property as against the hotel property, respectively. In these circumstances, the Commissioner obviously had no permissible bases upon which to determine the depreciation allowable, if any, on Lori's Villa Courts property (R. 473, 475, 477.) The Tax Court, therefore, had no alternative than to sustain, upon the evidence, the Commissioner's determination disallowing such depreciation for lack of proof. Sections 23 (l) and (n), 113 (a) and 114 (a), Internal Revenue Code; Section 19.23 (1)-2, Treasury Regulations 103.

Thus, contrary to the taxpayers' statement (Br. 37), deductions for depreciation were allowed them to the full extent of their proof, and necessarily disallowed otherwise. They have given no further evidence, moreover, to

¹⁴ Taxpayer Rose's statement to the Tax Court that Lori's Villa Courts property, acquired by others in 1930, had "record" "encumbrances in the amount of \$38,000.00, augmented by the * * * substantial trust funds of the Mary Allen trust [which] went into this property" (Tr. 22, p. 37), of course, can have no significance in respect of the depreciable bases of the property for the taxable years involved here.

enable this Court to determine what the proper bases were for purposes of depreciation during the taxable years. Nor do they cite any authority for the novel claim that a duty devolves upon the Tax Court to determine an allowance for depreciation upon the basis of their contentions "even if the petitioners' evidence was unsatisfactory". (Pet. Br. 37.) On the contrary, as shown, deductions for depreciation or otherwise may not properly be allowed unless and until the taxpayers have met the burden of overcoming the presumptive correctness of the Commissioner's determination by proper substantiating evidence. *Welch v. Helvering*, 290 U. S. 111, 115; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C.A. 9th). They have failed to do so here. The several cases cited by the taxpayers (Br. 37), moreover, clearly do not support that proposition. The taxpayers must prove their case, barring which their contentions must be denied. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593; *Welch v. Helvering*, *supra*; *San Joaquin Brick Co. v. Commissioner*, *supra*; *J. M. Perry & Co. v. Commissioner*, 120 F. 2d 123, 124-125 (C.A. 9th).

VIII

The corporate identity of Lori may not properly be disregarded for income tax purposes

Taxpayer Lori contends that it was improperly charged with the income included in its bank deposits because it was merely the title holder or agent for taxpayer Rose in respect of the property and funds held in its name, and therefore such income was properly chargeable to taxpayer Rose instead of to Lori. (Br. 22-24.) The argument is that since Lori was engaged solely in the business of holding real estate (Br. 22-23), without any beneficial interest in the property or in the funds received and disbursed in its name, its corporate identity should be disregarded for tax purposes to the end that no taxes should be imposed on it (Br. 24). The record does not support this contention.

In the first place, taxpayer Lori did not raise this issue in the Tax Court (R. 456-466), contending rather that its return for each of the years 1938 to 1941, inclusive (Exs.

A-D), “was a true return” or equally inept words to such effect (Tr. 22, pp. 14-15, 22-23, 27-28, 35-37). Consequently, since the issue was neither presented to nor considered by the Tax Court (R. 426-455), this Court should pass the point. *Helvering v. Salvage*, 297 U.S. 106; *General Utilities Co. v. Helvering*, 296 U.S. 200, 206.

In the event this Court decides to take cognizance of the new issue, however, it is submitted that the taxpayers have failed to show any substantial or persuasive reasons as to why, under the clear facts here, Lori should be any exception to the general rule that the corporate identity will not be ignored for tax purposes except for the most cogent reasons, absent here. *Moline Properties v. Commissioner*, 319 U.S. 436, 438-439; *Rogan v. Star Piano Co., Pacific Division*, 139 F. 2d 671, 674 (C.A. 9th). The facts do not warrant this Court’s ignoring the corporate entity of Lori for it was clearly not merely an adjunct, agent, instrumentality or nominee of taxpayer Rose’s professional or personal business activities. Rather, the record shows that it was a real operating corporation having “general corporate powers” authorizing it to carry on various business activities, and that it was actively engaged in carrying on corporate business operations in holding real estate and all things incidental thereto during the taxable years. (R. 56, 350, 419, 428.)

Thus, the evidence shows that Lori not only held real estate but, as taxpayer Rose testified (R. 419), it engaged in business activities consisting of collecting rents, paying real and personal property taxes, interest on loans, employees’ wages, Rose’s annual retainer fees, etc. It owned and operated its Villa Courts property, comprising nine bungalows and a dining room (R. 70-73, 432-433), and it was able to and “did borrow thousands of dollars that have gone into this property” during the taxable years (R. 350). It also made other loans from time to time, such as the \$7,000 loan from the Citizens Trust Company (R. 126-127), and regularly received “gross sums” of money from the Brevoort Enterprises in order to operate and pay the expenses covering both its Villa Courts properties and the Brevoort

hotel operations (R. 441). It leased its properties jointly with the hotel to others from time to time and collected its rents therefrom. (R. 435-436.) This was in excess of \$16,240 alone for 1939 (R. 72-73), and it had gross income around \$25,000 a year (R. 72), as the taxpayers state (Br. 23). It had an active bank account with deposits and withdrawals running, variously, in amounts in excess of \$25,000 to \$35,000 during the taxable years. (R. 445.) It realized taxable net income from its operations in the respective sums of \$9,488.13, \$8,167.24, \$11,965.17 and \$9,239.52, as redetermined by the Tax Court, for the taxable years 1938 to 1941, inclusive. (Tr. 61.) In these circumstances, it is apparent that, contrary to the taxpayers' contentions (Br. 22-24), there is an abundance of evidence showing that Lori had a tax identity distinct from taxpayer Rose for it was an active corporation carrying on a going business for profit. Therefore, it was obliged, under the taxing laws, to keep records, make returns of gross and net income, deductions, credits, etc., and pay taxes. *National Carbide Corp. v. Commissioner*, 336 U.S. 422; *Moline Properties v. Commissioner*, 319 U. S. 436, 438-439; *Higgins v. Smith*, 308 U. S. 473, 477; *National Investors Corp. v. Hoey*, 144 F. 2d 466, 467-468 (C.A. 2d).

In the *Moline Properties* case involving *much* less business activity than Lori's, the Supreme Court stated (p. 440):

In 1934 petitioner engaged in an unambiguous business venture of its own—it leased a part of its property as a parking lot, receiving a substantial rental. The facts, it seems to us, compel the conclusion that the taxpayer had a tax identity distinct from its stockholder.

Likewise, *Paymer v. Commissioner*, 150 F. 2d 334 (C.A. 2d), is a case almost directly in point. There the Raymep Realty Corporation, with two sole stockholders, was authorized with broad powers to do general corporate business in real estate. It held a single parcel of income-producing real estate, but the two partners managed it, collected the income, paid the expenses, deposited the receipts in Pay-

mer's bank account, and used the corporation's profits of the business as they pleased. Other than thus holding the parcel of real estate, the corporation's *sole* business activity during the taxable year was that of obtaining a single loan of \$50,000, and as security it assigned all the lessor's rights. The court held, nevertheless, that this was corporate activity sufficient to serve a business purpose and to justify holding that it did engage in business in that year, and therefore its corporate identity could not be ignored for income tax purposes.

In *National Investors Corp. v. Hoey, supra*, the court stated (pp. 467-468)—

whatever the purpose of organizing the corporation, "so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." * * * * * it merely declares that to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation; in other words, that the term "corporation" will be interpreted to mean a corporation which does some "business" in the ordinary meaning; * * *

Applying the rules laid down in the above-cited cases to the facts here, it is readily apparent that Lori must be held to have a distinct corporate identity for income tax purposes, and therefore, contrary to the taxpayers' contentions (Br. 23-24), it is chargeable with its own income and the resulting tax liabilities for the taxable years. See also *Interstate Transit Lines v. Commissioner*, 319 U. S. 590; *Burnet v. Clark*, 287 U. S. 410, 415; *Dalton v. Bowers*, 287 U. S. 404, 410; *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 413; *Rogan v. Star Piano Co., Pacific Division*, 139 F. 2d 671, 674 (C.A. 9th), certiorari denied, 322 U. S. 728; *John L. Denning & Co. v. Commissioner*, 180 F. 2d 288, 290-291 (C.A. 10th); *Watson v. Commissioner*, 124 F. 2d 437 (C.A. 2d).

The cases cited by the taxpayers (Br. 24), and distinguished hereinafter, are not at variance with the fore-

going decisions, and quite apart from the factual differences between the cases, the Supreme Court's decision in *Higgins v. Smith*, 308 U. S. 473, points clearly to the difference in the questions of law involved, as follows (p. 477):

A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do *some* business as a corporation, he must accept the tax disadvantages. * * * [Italics supplied.]

Such cases as *Seattle Hardware Co. v. Squire*, 181 F. 2d 188 (C.A. 9th), and *Keokuk & Hamilton Bridge v. Commissioner*, 180 F. 2d 58 (C.A. 8th), relied on by the taxpayers (Br. 24), are clearly distinguishable. In the *Seattle Hardware* case, this Court, distinguishing *National Carbide Corp. v. Commissioner*, 336 U. S. 422, affirmed the judgment of the District Court which had held that the separate entity of the taxpayer's subsidiary corporation should be ignored for tax purposes. The stated reasons were that the subsidiary was merely an instrumentality of the taxpayer's business, under complete domination and control of the taxpayer, without any *business purpose* or activity other than to hold and act as a nominal conduit for the passage of the title to the property in question, as a dummy, from the taxpayer's agent to the taxpayer itself for the taxpayer's use and benefit. Likewise, the *Keokuk* case involves a different factual situation. There the subsidiary corporation acted in the capacity of a mere agency upon its organization to make effective the transfer of the toll bridge as a gift to the city after the corporation's bonded indebtedness had been paid, and therefore it was held not taxable on the income received from operating the bridge during the interim period.

IX

The Tax Court properly sustained the Commissioner's determination disallowing, for lack of proof, Lori's claimed deductions for "related" business expenses paid by others.

The taxpayers contend that if Lori is taxable on any of the income included in any of its bank deposits, it should be allowed deductions for "related expenses" in the re-

spective sums of \$10,748.62 and \$6,107.21 for the years 1938 and 1939 which were paid by taxpayer Rose out of moneys received by him from Lori. (Br. 25-27.) The argument is that since Lori received from Brevoort moneys in respect of the hotel and Villa Courts and paid them out, through Rose, for the expenses of both the hotel and Villa Courts, there is no apparent reason why such expense items should not be allowed as deductions merely because they were paid through Rose's bank accounts. (Br. 26.) This contention is without basis in the record.

The record shows that the *total* amounts in question were allowed by the Tax Court as a reduction in Rose's taxable income for those years upon his establishing that he had paid the current operating expenses of Lori *and* the hotel in those amounts out of his own bank accounts—which had been augmented by funds he received from Lori, which in turn had received “gross sums” from Brevoort—covering expenses of operation of *both* the hotel and Villa Courts. (R. 441; Pet. Br. 26.) There is no showing, however, that these amounts were not claimed and allowed in whole or in part as deductions to both Lori and/or Brevoort (R. 446-447, 450), as well as to Rose (R. 441). Hence, without more, to allow the same deductions now to Lori would be allowance of double deductions which is not permissible for income tax purposes. Section 23(a)-1 of Treasury Regulations 103. Moreover, the taxpayers admit that Lori paid out these moneys through Rose for both Brevoort's hotel expenses and its own Villa Courts expenses (Br. 26). Therefore, in the absence of any segregation shown in respect of the amounts involved as between those two entities, there is no basis for this Court's allowing them as deductions to Lori. Section 19.23 (a)-1, Treasury Regulations 103 (Appendix, *infra*). The statute and Regulations permit deductions for ordinary and necessary business expenses paid or incurred by the *taxpayer* in carrying on any trade or business during the taxable year, and also provide that “deductible” expenses include only such expenditures as are “directly connected with or pertaining to the taxpayer's trade or business”. Section 23(a)(1)(A), Internal Rev-

enue Code; Section 19.23 (a)-1, Treasury Regulations 103 (Appendix, *infra*). They do not allow deductions to the taxpayer for its "related expenses" or its business expenses paid by another, as claimed by taxpayer Lori here. (Br. 25-27.) Hence, there is no basis established for the claimed deductions here because the taxpayers have shown no segregation of the items allegedly representing *Lori's* income and expense deductions. (R. 449-450.)

The evidence shows that while taxpayer Rose was financially involved in both properties (R. 432-433), nevertheless Brevoort handled and operated the hotel and Lori owned and operated the Villa Courts property, and it was agreed that the receipts under the joint leases of the two properties should go one-third to Lori and two-thirds to the Brevoort Hotel enterprises (R. 432-436, 461-462). Aside from the record's showing the *combined* receipts and disbursements—"operating profit before fixed expense" (R. 137)—of both the hotel and Villa Courts for a part of the year 1938 (R. 134-137, 434-435; Ex. 14), the receipts from the leases of those properties (Exs. P, Q and 89) are in evidence only to the extent of cancelled checks totaling \$18,877.92 covering a part of 1939 and two payments in the early part of 1940 (Ex. 50). There is no showing, however, of the *total* receipts from such properties covering the rest of those years and the entire year 1941, nor is there any segregation of receipts and disbursements as between Brevoort's hotel and Lori's Villa Courts properties, other than to the limited extent established by taxpayer Rose and thereupon conceded and allowed by the Commissioner and additionally adjusted by the Tax Court. (R. 441, 445-447.)

Moreover, the record shows that these items now claimed by the taxpayers (Br. 25-27) as deductions from Lori's taxable income for 1938 and 1939, as already redetermined by the Tax Court (Tr. 61), represent almost entirely the expenses of Brevoort's hotel enterprise (R. 144-153, 169-170, 197, 201-202, 208-209; Exs. 15-21, 23, 48, 58, 63-69, 86). In fact, one of the items, \$940 (Pet. Br. 25), applies to neither the Brevoort hotel nor Lori's Villa Courts, the

record showing that it represents interest paid on mortgage loans on the "Hotel Angie" in Pasadena (R. 201-202; Ex. 69). The only other exceptions thereto (in addition to Lori's taxes, \$508.65) are the street bond assessment (\$40.09) and the 1937 personal property taxes paid in 1938 (\$263.27), levied against *both* the hotel and Lori. (R. 150-151; Exs. 20 and 21.) Since the taxpayers have furnished no segregation as to these amounts (Br. 25), they have not established what portion thereof, if any, is allocable to and therefore deductible by Lori. Even if they were segregated, however, the street bond assessment would not be deductible in any event for that was a capital expenditure (Section 23 (c)(4) of the Revenue Act of 1938 and Section 24 (a) (2) and (3), Internal Revenue Code (Appendix, *infra*)); and the 1937 property tax paid in 1938 is not deductible for the latter year (Section 43, Internal Revenue Code; Section 19.43-2, Treasury Regulations 103 (Appendix, *infra*)). Nor is any part of the item, \$1,753.54, representing real estate tax paid on the Brevoort hotel property (R. 208-209; Ex. 86; Pet. Br. 25) shown to have been allocable to Lori's property. Finally, as to the item of 1938 real estate taxes (\$508.65) on Lori's property (Br. 25), included in the claimed total deduction of \$598.65 for 1938 (R. 149), the taxpayers have not shown that such amount was not allowed to Lori as part of the expenses it had paid out in connection with the operation of "both" the Villa Courts and the hotel in the sum of \$9,295, additionally adjusted in Lori's favor by the Tax Court for the year 1938 (R. 447, 450; Tr. 61). Significantly, that amount of \$508.65 (Ex. 19), claimed now as a deduction for Lori (Br. 25), is the identical amount shown as paid by taxpayer Rose on behalf of *Brevoort* for that year (Ex. GG).

In any event, there is no evidence showing that taxpayer *Lori*, of and for itself, paid such amount (\$508.65) for taxes, or any of the other amounts contended for as "related expenses" which the taxpayers state "apparently" represent the items of business expense claimed for it here. (Br. 25.) Since taxes are ordinarily deductible only by the person upon whom they are imposed (Article 23 (c)-1, Treasury

Regulations 101 (Appendix, *infra*)) and business expenses only by the taxpayer to whose business they directly relate (Section 19.23 (a)-1, Treasury Regulations 103), and taxpayer Rose admittedly paid the items in question out of moneys received from Lori and/or Brevoort (R. 441; Br. 25-26) without any segregation shown, it is apparent that they are not shown to have constituted allowable deductions to Lori. Nor is there any showing that taxpayer Rose paid any such items on behalf of Lori, in excess of the amounts substantiated and therefore conceded by the Commissioner and allowed by the Tax Court upon the taxpayers' adducing further evidence in connection therewith at the hearing below. (R. 440-441, 446; Tr. 61) It is quite plain, therefore, that there is no basis shown for further allowance of these items in that the taxpayers have made no successful effort to establish affirmatively other than by their own contentions that the expenses and taxes they represent have not already been allowed in full or partially at least by the Tax Court in making the further allowances to Lori upon its additional evidence adduced in explanation of the items previously unidentified (R. 446-447), and giving effect thereto upon adopting the Commissioner's recomputations for those years (Tr. 61). Moreover, contrary to the taxpayers' contentions (Br. 26-27), in so far as Lori's and the Brevoort hotel's unsegregated business expenses were paid voluntarily by or through Rose from unsegregated funds received from Lori and/or Brevoort, they do not constitute proper deductions from income for tax purposes for either Rose or Lori for, as the taxpayers admit (Br. 23, 25), they were not, in the case of Lori, paid by the *corporate* taxpayer but by others, and there is no segregation showing whether or to what extent either Rose or Lori was liable therefor. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593-594; *Deputy v. duPont*, 308 U. S. 488, 493-494; *Welch v. Helvering*, 290 U. S. 111, 114-115; *Burnet v. Clark*, 287 U. S. 410; *Omaha Nat. Bank v. Commissioner*, 183 F. 2d 899, 901 (C.A.8th); *Friedman v. Delaney*, 171 F. 2d 269 (C.A.1st), certiorari denied, 336 U. S. 936; *Knight-Campbell*

Music Co. v. Commissioner, 155 F. 2d 837, 840 (C.A.10th), and cases cited therein; *Chenango Textile Corp. v. Commissioner*, 148 F. 2d 296, 297 (C.A.2d).

The cases (*Minnesota Tea Co. v. Helvering*, 302 U. S. 609, and *United States v. Boston & M. R. Co.*, 279 U. S. 732) relied on by the taxpayers (Br. 26-27), do not support their claim for the deductions in question on behalf of Lori, but hold to the contrary. Those cases stand for the proposition that the payment by another of a taxpayer's debts constitutes taxable income to the debtor for tax purposes. This, conversely, supports our position that such amounts of Lori's business expenses as were paid by Rose on its behalf, do not constitute deductions to Lori but rather income to the extent paid by another.¹⁵

X

The Tax Court did not err in declining to exclude from Lori's income the sums aggregating \$8,156.76 allegedly representing Rose's personal loans deposited in Lori's bank account during 1939-1941, or the sums totaling \$3,955 allegedly representing Rose's moneys transferred from his accounts to Lori's account during those years but not income to Lori because they were not rentals allocable to Lori's Villa Courts property.

The taxpayers contend that the moneys borrowed by taxpayer Rose individually and deposited in Lori's account, in

¹⁵ It is arguable that such payments, voluntarily made by taxpayer Rose, were improperly allowed by the Tax Court as deductions or offsets against his taxable income for the taxable years for the reason that he made the payments in order to "protect and preserve his equities in the various properties [including Lori's Villa Courts], the operations of which inured to his benefit." (R. 441.) Hence, they were not proper deductions from his income but rather were capital contributions representing additional cost of his stock in the corporation. *Burnet v. Clark*, 287 U.S. 410, 414; *A. Giurlani & Bro. v. Commissioner*, 119 F. 2d 852, 857-858 (C.A. 9th); *Omaha Nat. Bank v. Commissioner*, 183 F. 2d 899, 901 (C.A. 8th); *Chenango Textile Corp. v. Commissioner*, 148 F. 2d 296 (C.A. 2d); *Blackwell Oil & Gas Co. v. Commissioner*, 60 F. 2d 257, 258 (C.A. 10th).

the aggregate sum of \$8,156.76, and also the funds in the total sum of \$3,955 transferred from his accounts to Lori's account which allegedly did not represent rentals allocable to its Villa Courts property, during the years 1939 to 1941, inclusive, should be excluded from Lori's taxable income for those years. (Br. 27-30). There is no basis for these contentions.

A. The Tax Court properly sustained the Commissioner's determination including the sums totaling \$8,156.76 in Lori's taxable income for the years 1939 to 1941, inclusive

The taxpayers contend (Br. 27-28) that since Lori's income was determined on the basis of its bank deposits and its bank account was used as a depository of substantial sums in which it had no interest (R. 447), the Tax Court should have excluded the deposit-items here in question from Lori's income for they were of the same character as other items excluded therefrom by the Tax Court (R. 446).

The record shows that the other items excluded from Lori's income, whether or not of the same character, were allowed only upon the taxpayers' adducing additional evidence whereby the Commissioner recognized and conceded and the Tax Court allowed their exclusion from income. (R. 446-447.) Those items, however, were *established* by the taxpayers as properly excludible, whereas the present items have not been identified or proved as not representing income to Lori. The fact that Lori's account was used by taxpayer Rose as a *general* depository for his and others' receipts and deposits, in some of which Lori had no interest (R. 447), as the taxpayers state (Br. 27), together with their lack of records showing segregation of receipts and disbursements of the various taxable entities (R. 431, 434-435, 441, 445, 447), is one of the very reasons they were unable to prove below, as they are here, that these items did not represent income to Lori (R. 449-450). *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C.A.9th). In any event, it falls far short of proving that the items here in controversy did

not embrace transactions constituting income to Lori. The taxpayers, without any substantiating books or records, were unable to prove below that these items were improperly included in Lori's income even though they did, with additional evidence, in respect of other items conceded by the Commissioner and allowed by the Tax Court. (R. 446-447, 450.) In so far as the record shows, however, the present items were properly included in Lori's income by the Commissioner and the Tax Court for the years 1939 to 1941, inclusive (R. 472-479; Tr. 61, pp. 3-11), and the taxpayers have shown nothing to the contrary (Br. 27-28). They have not shown affirmatively that the funds in question were not allowed by the Commissioner in his determination or by the Tax Court upon redetermination of Lori's taxable income. Moreover, since these items represent the same transactions in connection with which taxpayer Rose claimed exclusion of such amounts from his taxable income for the same years, they should not be excluded from Lori's income for the same reasons—lack of proof—heretofore shown in respect of their non-excludibility from Rose's income for those years. See Point II, *supra*. *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593; *Helvering v. Bruun*, 309 U. S. 461, 467-468; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C.A.9th).

B. *The Tax Court correctly sustained the Commissioner's determination including the sums aggregating \$3,955 in Lori's taxable income for 1939-1941 as representing rentals allocable to its Villa Courts property*

As to the second group of three items aggregating \$3,955, the taxpayers claim that they represented funds transferred from Rose's accounts to Lori's account and not rental receipts from Lori's Villa Courts property. (Br. 28-30.) The record shows, however, that the Tax Court excluded from Lori's taxable income so much thereof as the taxpayers were able to establish as representing transfers of personal loan moneys from Rose's accounts, over-statements of lease receipts properly allocable to the Brevoort hotel and not to Lori's Villa Courts properties, etc., and therefore, again

for lack of proof, it was obliged to disallow the remaining items which the taxpayers could not properly account for or identify as not representing income to Lori. (R. 446-447.) There was no basis for the Tax Court's excluding the items in question from Lori's income because, in so far as the evidence shows, they represented additional rental receipts from the Linck and later leases, partially allocable to each the Brevoort hotel and Lori's Villa Court property. (R. 435-436, 439; Exs. Q and 89.) As shown, however, since the record shows only the unsegregated *combined* rentals received together by both the hotel and Lori for a part of 1939 and the early part of 1940 (Ex. 50), but none for the rest of 1940 or for 1941, the Tax Court had no grounds for excluding from Lori's income any more than the taxpayers could identify as properly allocable to the hotel's portion of the lease receipts, and therefore not income to Lori (R. 446-447, 450; Ex. FF). Likewise here, there is no basis for further allowance of the items in question for the taxpayers have made no effort to establish affirmatively other than by their own contentions that the *hotel's* portions of the lease receipts transferred from Rose's accounts to Lori's account have not already been allowed in whole or in part as exclusions from Lori's income by the Tax Court in making its redetermination of Lori's net income for 1939 to 1941, inclusive. (R. 446-447, 450.)

In these circumstances, contrary to the taxpayers' contention (Bd. 29-30), there was no showing below (R. 446-447) nor is there here, that the amounts in question, to the extent unidentified, did not in fact represent rental receipts properly allocable to Lori's Villa Courts property. Nor, since "all rentals were [first] payable to petitioner" Rose under the joint leases, and thereafter one-third thereof was "to be credited to Lori" (R. 435-436, 461-462; Exs. Q and 89), can it be denied that they were first collected and deposited by Rose in his own account "without making any segregation" between them and his other intermingled funds (R. 434), and thereafter transferred to Lori's account (R. 431, 434, 447, 462). Consequently, so far as the

record shows, there undoubtedly were such transfers from Rose's account, as the taxpayers state (Br. 28-30), but quite plainly there were also transfers to Lori's account of *its* undisclosed share of the rental receipts allocable to its Villa Courts property. Considering the very confused status of the taxpayers' testimony and exhibits (R. 449), as well as the absence of records (R. 436, 449), moreover, it is clear that there is no *reliable* evidence in this record whereby these transactions can be accurately traced, segregated or proved. Hence, regardless of whatever extent to which taxpayer Rose retained in his own accounts or transferred to Lori the unsegregated receipts from the leases (R. 435-436, 447; Pet. Br. 30), the undisclosed portion thereof representing Lori's rentals still remained income to Lori, and was properly so determined by the Commissioner and the Tax Court (R. 446-447, 449-450). *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C.A. 9th). As heretofore shown, however, the taxpayers' inability to prove their case because of their very haphazard, inadequate records (Exs. R, 12, 94, 95), totally without regard to the nature of their income and deductions for tax purposes or the possibility of showing their correct income (R. 449-450), all directly contrary to law (Section 54 (a), Internal Revenue Code; Sections 19.41-3 and 19.54-1, Treasury Regulations 103 (Appendix, *infra*)), merely leaves them without remedy on this issue for lack of proof. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593-594; *Helvering v. Bruun*, 309 U.S. 461, 467-468; *Roberts v. Commissioner*, 176 F. 2d 221 (C.A. 9th); *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 200, 225 (C.A. 9th); *Belser v. Commissioner*, 174 F. 2d 386, 390 (C.A. 4th), certiorari denied, 338 U.S. 893; *Omaha Nat. Bank v. Commissioner*, 183 F. 2d 899, 902 (C.A. 8th).

XI

Lori is not entitled to any excess profits credits in the determination of its excess profits tax liability for any of the taxable years involved.

Lori now contends for the first time that it should be allowed excess profits credits equal to its average net in-

come as redetermined by the Tax Court for the years 1938 and 1939, and that since such credit, under the statutory formula, cannot be mathematically less than 95% of the average base period "excess profits net income" for the second half (1938-1939) of the four-year statutory "average base period" (1936-1939) prescribed by Sections 711 and 713 of the Internal Revenue Code, there can be no excess profits tax liability chargeable against it for unspecified taxable years.¹⁶ (Br. 31-33.)

In the first place, the record shows that this issue was neither presented to nor considered by the Tax Court. (R. 426-455, 456-466; Tr. 32, 39; Exs. A-D.) Therefore, it had no basis or occasion to pass on it. Hence, this Court is not called upon to decide the point but should pass it. *Helvering v. Salvage*, 297 U.S. 106; *General Utilities Co. v. Helvering*, 296 U.S. 200, 206; *Harvey v. Commissioner*, 171 F. 2d 952, 955 (C.A. 9th); *Popular Priced T. Co. v. Commissioner*, 33 F. 2d 464 (C.A. 7th); *Hanby v. Commissioner*, 67 F. 2d 125 (C.A. 4th).

In the event this Court should see fit to take cognizance of the new issue raised here for the first time, however, it is submitted that Lori has failed to prove that it is entitled to such excess profits credits. Lori first raised this point in its objections (with alternative computations (Tr. 38)), to the Commissioner's recomputation of its tax liabilities for the taxable years, submitted to the Tax Court in compliance with its opinion redetermining all the issues *then* involved in the case (Tr. 61). Lori's objections, however, were not filed until almost two years after the hearing

¹⁶ Taxpayer Lori does not specify the years for which the excess profits credits are claimed. (Br. 31-33.) Since they are applicable only to taxable years beginning after December 31, 1939 (Section 710 (a) of the Internal Revenue Code), however, it is assumed that the credits are claimed for the years 1940 and 1941. Moreover, since this issue was not raised below, we discuss it on the merits only alternatively, and therefore have not deemed it necessary to include the above statutory provisions in the Appendix to this brief. They are reprinted sufficiently for present purposes, however, in the Appendix to the taxpayers' brief (pp. 2-7).

was terminated and the case submitted below (R. 425), and after its first motion for rehearing, without mentioning the new issue ¹⁷, had been denied by the Tax Court (Tr. 32). Hence, neither the Commissioner nor the Tax Court was apprised of any claim for excess profits credits. *Commissioner v. West Production Co.*, 121 F. 2d 9, 11 (C.A. 5th), certiorari denied, 314 U.S. 682, held that the party (Commissioner here) moved against in administrative proceedings, as here, “has the right *** to be fully advised of the allegations comprising the claim [excess profits credit here] against him”, barring which such “new issues cannot be raised at the hearing under Rule 50” which is designed solely “for purposes of preparing the computation in accordance with the issues raised, presented, and determined at the hearing on the merits, and this method should have been followed in this case.” *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 312-313.

Rule 50 of the Rules of Practice before the Tax Court of the United States prescribes the procedure for computing the correct amount of the deficiency to be entered in its decision after it “has heard and decided the issues raised and presented on the merits. In terms, it directs that the hearing on the computation *** is to be ‘confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given *** any new issues.’ ***.” *Bankers Coal Co. v. Burnet*, 287 U. S. 308, 312-313. The hearing under that Rule is solely for the purpose of enabling the Tax Court to compute the deficiency in accordance with its decision of the issues already raised and presented at the hearing of the proceedings on the merits, and new issues, other than those relating specifically to computation of the tax *on the basis of its findings of fact and opinion*, may not be raised and urged on the hearing on the settlement of the deficiencies under the Rule. *Bankers Coal Co.*

¹⁷ Neither did Lori’s second motion for rehearing raise this point. (Tr. 39.)

v. *Burnet*, *supra*, p. 313; *Harvey v. Commissioner*, 171 F. 2d 952, 955 (C.A. 9th); *Sooy v. Commissioner*, 40 F. 2d 634 (C.A. 9th); *Fifth Street Bldg. v. Commissioner*, 77 F. 2d 605 (C.A. 9th). Just as the Commissioner may not claim increased deficiencies upon an issue not previously asserted under Rule 50 computations (*State Consol. Oil Co. v. Commissioner*, 66 F. 2d 648, 650 (C.A. 9th), certiorari denied, 290 U. S. 704; *Commissioner v. Sussman*, 102 F. 2d 919 (C.A. 2d); *Commissioner v. Erie Forge Co.*, 167 F. 2d 71, 77 (C.A. 3d)), so here Lori may not claim decreased deficiencies upon the excess profits credits issue not previously raised, in its alternative computations under that Rule. As Lori stated in its Brief in Lieu of Personal Appearance Under Rule 50 (Tr. 44), "A computation under Rule 50 must be based entirely upon the established facts found within the four corners of the Court's findings of fact", citing *State Consol. Oil Co. v. Commissioner*, *supra*, and therefore "It necessarily follows that any facts not shown in the Court's findings of fact may not be applied in a computation under Rule 50."

In these circumstances, since nothing in respect of excess profits *credits* was presented to the Tax Court in order to enable it to make the necessary findings, and the taxpayer admits (Br. 32) that "there is no finding by the Tax Court here with respect to the *excess profits net income* of either 1938 or 1939" [*italics supplied*], which is absolutely essential to a determination of such credits,¹⁸ it is patently impossible to determine upon this record, the requisite excess profits net income, and in turn the claimed excess profits credits. Hence, since Lori did not even present the issue below, much less the necessary information and data in respect of the excess profits net income essential

¹⁸ The Treasury Department has advised counsel for the respondent that the necessary data and information were not furnished by the taxpayer in order to enable the Commissioner to determine or the Tax Court to ascertain and make findings in respect to Lori's excess profits net income, essential to a determination of the excess profits credits.

to a finding of excess profits credits, it is apparent that its claim for credits cannot be allowed for lack of proof.

There is nothing in *Helvering v. Taylor*, 293 U. S. 507, relied on by the taxpayers (Br. 33), which required or enabled the Tax Court to make a finding in respect of the highly-technical statutory excess profits net income and/or credits, in view of the taxpayer's admitted failure to have presented the issue in its pleadings or at the hearing below, or to have adduced any evidence permitting it (Br. 32). Nor does *Zimmermann v. Commissioner*, 36 B.T.A. 618, 620, reversed and remanded, 100 F. 2d 1023 (C.A. 3d), relied on by Lori (Br. 32), help its case. There the Commissioner's recomputation under Rule 50 giving effect to the Board's decision allowing claimed capital losses to the taxpayers, also injected into the case a *new* item—15% statutory limitation on charitable contributions—which was not contained in the pleadings or presented by the Commissioner at the hearing before the Board. The taxpayers objected thereto as raising a new issue inhibited under that Rule. The Board held, however, that the Commissioner's action in so doing was proper under Rule 50 proceedings because such additional adjustment, even though a new issue not raised in the pleadings or at the hearing below, was necessarily involved in the arithmetical calculations incident to a correct recomputation of tax liability in compliance with its opinion. In harmony therewith, Lori now attempts to inject a new issue in respect of excess profits credits—neither raised in the pleadings nor at the hearing below—through the instrumentality of its objections (with alternative computations) filed to the Commissioner's recomputations submitted under Rule 50 (Tr. 38, 61), as properly constituting merely a mathematical calculation incident to recomputation, "even though no issue respecting that result is raised in the pleadings" (Pet. Br. 32). Lori's contentions in this connection, however, are negatived by the appellate court's setting aside and remanding (100 F.2d 1023, *per curiam*) the *Zimmermann* decision relied on by Lori. Moreover, over and above these considerations, we have already shown that Lori

cannot prevail in any event for lack of proof of material facts.

XII

There is substantial evidence to support the Tax Court's findings sustaining the Commissioner's determinations of the 50% fraud penalties against the taxpayers for all taxable years involved because "any" of the deficiencies asserted for those years were due to fraud with intent to evade taxes.

The issue here is whether the findings of the Tax Court that the several taxpayers are liable for the 50% fraud penalties imposed as statutory additions to the deficiencies in taxes asserted by the Commissioner and sustained in part by the Tax Court for the taxable years 1938 to 1941, inclusive, are supported by the record. The Commissioner asserted the 50% fraud penalties as additions to the deficiencies determined against all the taxpayers for all four taxable years involved, except the separate liability of taxpayer Rose's wife for the years 1939 and 1941,¹⁹ under sections 22 (a) and 293 (b), respectively of the Internal Revenue Code (Appendix, *infra*). (R. 451.) The Tax Court sustained the determinations in part and thereupon found, "upon the record as a whole" (R. 452), that, with the exception noted, the returns filed by the taxpayers for the taxable years involved were fraudulent; that the taxpayers intended by their actions and omissions to evade taxes (Exs. A. to J, inclusive); and that the Commissioner had sustained his burden of proof in respect of fraud for each taxable year involved (R. 444, 449, 451-454). The taxpayers contend that this was error. (Br. 40-44.)

It is settled that whether an understatement of or failure to report income was due to fraud presents solely a ques-

¹⁹ While fraud was determined by the Commissioner and sustained by the Tax Court against both taxpayer Rose and his wife in respect of their return filed jointly for the year 1940 (R. 13, 444; Ex. H), it was not found against her for the year 1938 for which he filed a return singly (Ex. E), or for 1939 and 1941 for which she filed separate returns (R. 444, Exs. I and J). Fraud was charged against taxpayers Rose and Lori, however, for all taxable years involved. (R. 444, 449; Exs. A-H.)

tion of fact, and that the Tax Court's determination is final if supported by substantial evidence and is not "clearly erroneous". *Helvering v. Kehoe*, 309 U. S. 277, 279; *Rogers v. Commissioner*, 111 F. 2d 987 (C.A. 6th); *Hoefle v. Commissioner*, 114 F. 2d 713, 714-715 (C.A. 6th); *Cohen v. Commissioner*, 176 F. 2d 394, 399-400 (C.A. 10th); *Greenfeld v. Commissioner*, 165 F. 2d 318 (C.A. 4th); *Halle v. Commissioner*, 175 F. 2d 500, 503-504 (C.A. 2d), certiorari denied, 338 U. S. 949; *Heyman v. Commissioner*, 176 F. 2d 389, 393-394 (C.A. 2d), certiorari denied, 338 U.S. 904; *Harris v. Commissioner*, 174 F. 2d 70, 72 (C.A. 4th); Rule 52(a), Federal Rules of Civil Procedure; *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869; Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869, 991 (26 U.S.C. 1946 ed., Supp. II, Sec. 1141). As stated in *National City Bank of New York v. Helvering*, 98 F. 2d 93, 96 (C.A. 2d):

Although fraud must be well proved, the taxpayer has the burden of showing that the Commissioner was wrong and that the Board had no basis for its finding.

"Fraud cannot be lightly inferred, but must be established by clear and convincing proof." *Rogers v. Commissioner*, *supra*, p. 989. The obligation of the Commissioner to prove it, however, relates only to the penalty and not to the correctness of the deficiency. *Cohen v. Commissioner*, 9 T.C. 1156, affirmed, 176 F. 2d 394 (C.A. 10th). It is settled that "there is no burden upon the Government to prove its case beyond a reasonable doubt". *Helvering v. Mitchell*, 303 U. S. 391, 403; *Spies v. United States*, 317 U.S. 492, 495.

The taxpayers, in attempted expiation of their obvious fraud (R. 452), make great pretense of ignorance of the law even though taxpayer Rose, the controlling member of the group, has been a prosperous and successful lawyer for some years in Los Angeles (R. 428-429). In this connection, the fact should not be overlooked that such a taxpayer would ordinarily be no unlettered person, ignorant of the

methods of business and the purlieus of the law, while carrying on a successful practice under the keen competition that obtains in the metropolis of the West Coast. Cf. *Halle v. Commissioner*, 175 F. 2d 500, 502 (C.A. 2d), certiorari denied, 338 U. S. 949. Nevertheless taxpayer Rose, trapped in the dilemma of his own making, now disingenuously represents to this Court (Br. 40, 41) that he is “a helpless infant in accounting and income tax matters”, as shown by the fact that he filed his and his controlled-corporation Lori’s 1938 tax returns disavowing thereon any income or tax liability for either, whereas the Tax Court redetermined large amounts of taxable net income for both for that year (Tr. 61, 81). This, he states (Br. 41), makes obvious his inability to have differentiated between income, receipts, expenses, disbursements and obligations (presumably in income tax matters). This is made further manifest, he argues (Br. 42), by his principal contention, as below (R. 450), that since most of the moneys received by him and his controlled entities (R. 431-436) were paid out indiscriminately from year to year without records kept or segregation made as to the nature of their expenditures so far as tax deductions were concerned, their taxable income was no greater than that which they had reported for each year, and therefore the returns were necessarily correct as filed (R. 431, 434, 435, 436, 447, 449). The Tax Court rejected these contentions as totally lacking in merit. (R. 450.)

We doubt that, under the facts here, this Court will be impressed with taxpayer Rose’s professed ignorance of the law and accounting, totally unaware of the requirements of the federal income tax laws, in his attempt to excuse the false returns in question. In *Wickham v. Commissioner*, 65 F. 2d 527 (C.A. 8th), where the taxpayer made a like claim, the court stated (pp. 531-532): “This testimony did not impress the Board of Tax Appeals, nor has it impressed us.” Even if this contention were true, however, lack of familiarity with the tax laws and Regulations is no valid excuse. As the court stated in respect of the

“unlearned” taxpayer in *Harris v. Commissioner*, 174 F. 2d 70, 71-72 (C.A. 4th):

It is true that he was deficient in those capacities that make for accurate accounting, but he was prudent and canny enough to amass a considerable fortune in the business world so that at the end of the period his net worth was substantially greater than it was at the beginning. This fact cannot be denied, even though the estimate of the Tax Court that he was worth some \$80,000 more in 1942 than in 1934 may be disputed.

Likewise it cannot be denied that taxpayer Rose, the alleged helpless infant in income tax matters (Br. 40), who knew not the difference between income and receipts, expenses and disbursements, or expenses and obligations (Br. 41), nevertheless proved his capacity for amassing considerable wealth, without reporting it as income, whether or not the Tax Court’s finding of a substantial increase in his net worth during the taxable years (R. 431-436, 443, 444; Ex. S; Br. 20-21), may be disputed. A casual reading of the revealing provisions of Exhibit HH in respect of Rose’s acquisition of Mary Allen’s assets, will leave no doubt in the matter.

Contrary to the taxpayers’ contentions (Br. 40-44), the clear and convincing evidence of record does not warrant this Court’s absolving them from the charges of fraud. The Commissioner fully sustained his burden of proof on the fraud issues by showing that the taxpayers realized large but unexplained sums of money from the operation of taxpayer Rose’s legal profession as well as from his controlled business operations—Lori, Brevoort Enterprises, the hotel, and Villa Courts, etc.—which they failed to account for or report in their tax returns. (R. 451-452). The Tax Court made findings of its own in respect of fraud for all four years involved (R. 444, 449, 452-454), and the entire evidence of record shows that no other factual conclusions were possible than that the returns filed by the several taxpayers were false and fraudulent, and that—with the exception noted—“any” of the deficiencies in controversy

were due to fraud with intent to evade taxes (R. 444, 449), within the meaning of Section 293 (b) of the Internal Revenue Code. The Tax Court's findings are abundantly supported by the record.

Thus, the Tax Court found, upon all the evidence, that all the taxpayers together who had reported an aggregate net income of only \$37,801.46 (Exs. A-J) for the taxable years involved had thereby understated their true income by more than \$80,000 for those years (Tr. 35, 61, 71, 81; Br. 20). The Tax Court also found upon the evidence (R. 444, 449) that—

Any deficiencies in tax due from petitioner in the years 1938, 1939, and 1941, and from petitioner and his wife in the year 1940, are due to fraud with intent to evade tax.

* * * *

Any deficiencies against Lori are due to fraud with intent to evade taxes.

Likewise, it found in its opinion (R. 452, 454) that—

We are convinced that, upon the record as a whole, petitioners were fraudulent, and intended, by their actions and/or omissions, to evade tax.

* * * *

Our discussion with reference to the fraud penalties determined against the individual petitioners is equally applicable to Lori, the corporate petitioner. * * *

Upon reading the Tax Court's opinion one is readily impressed with the fairness with which the taxpayers were treated. The Tax Court nevertheless, upon a consideration of all the facts and circumstances, found that they were guilty of an *intent* to file false and fraudulent returns for each of the four years involved. (R. 452.) In so finding, it was not unmindful of the statute (Section 1112 of the Internal Revenue Code (Appendix, *infra*)) which places upon the Commissioner the burden of establishing fraud by clear and convincing evidence. (R. 444, 449, 451-454.) In this connection, the Tax Court pointed out that the Commis-

sioner had shown that large unexplained amounts of money had passed through the taxpayers' various bank accounts during the taxable years which in large part not even the taxpayers could identify or explain, and that this must be considered as substantial evidence in determining fraud. (R. 452.) From these facts, the Tax Court was warranted in finding clear and convincing proof that all the taxpayers filed fraudulent returns and that they intended by their actions and omissions to evade taxes for each of the four years involved. (R. 452-454.) *Rogers v. Commissioner*, 111 F. 2d 987, 989 (C.A.6th); *Hoefle v. Commissioner*, 114 F. 2d 713 (C.A.6th); *Battjes v. United States*, 172 F. 2d 1, 5 (C.A.6th); *Cohen v. Commissioner*, 176 F.2d 394 (C.A.10th); *Harris v. Commissioner*, 174 F. 2d 70 (C.A.4th); *Stinnett v. United States*, 173 F. 2d 129 (C.A.4th), certiorari denied, 337 U.S. 957; *Halle v. Commissioner*, 175 F. 2d 500, 504 (C.A.2d), certiorari denied, 388 U. S. 949; *National City Bank of New York v. Helvering*, 98 F. 2d 93, 96 (C.A.2d); *Heyman v. Commissioner*, 176 F. 2d 389, 394 (C.A.2d), certiorari denied, 338 U.S. 904; *Greenfeld v. Commissioner*, 165 F. 2d 318, 320-321 (C.A.4th); *Humphreys v. Commissioner*, 125 F. 2d 340 (C.A.7th), certiorari denied, 317, U. S. 637; *Seifert v. Commissioner*, 157 F. 2d 719 (C.A.2d); *Maddas v. Commissioner*, 114 F. 2d 548 (C.A.3d).

The fact that the taxpayers failed to report substantial amounts of income consistently from year to year is in itself evidence of fraud. *Rogers v. Commissioner*, *supra*, p. 989; *Halle v. Commissioner*, *supra*, p. 503; *Mitchell v. Commissioner*, 89 F.2d 873 (C.A.2d), reversed on other grounds, 303 U. S. 391.²⁰ During the four taxable years involved the taxpayers, individual and corporate, reported *less than one-*

²⁰ In the *Mitchell* case the Court of Appeals held that there was ample evidence to sustain the finding of the Board of Tax Appeals (now the Tax Court) that there was fraud with intent to evade the tax, but that Mitchell's prior acquittal on the charge of violation of a criminal statute relating to fraudulent evasions of income tax prevented the imposition of the 50% penalty. The Supreme Court reversed on that issue.

third of their aggregate taxable net income (R. 429-430, 448; Exs. A-J), as redetermined by the Tax Court (Tr. 35, 61, 71, 81). Nevertheless, they insist, as in the Tax Court (Tr. 22), that their returns were correct or reasonably so, as filed (Br. 21), and state somewhat unconvincingly, "Call that what you will, it is the very antithesis of fraud" (Br. 42). There were no statements or indications whatever in any of the taxpayers' returns to put the Commissioner on notice that the amounts of net income, if any, as reported therein represented grossly understated sums for the years in which the taxpayers had in fact realized and concealed large amounts of income. (Exs. A-J.) On the contrary, there were statements on their returns clearly designed to mislead the Commissioner—taxpayer Rose's filing his and his controlled corporation Lori's 1938 returns reporting no taxable income but stating thereon, "I Owe Nothing", and "This corporation has gone into debt for the year 1938 and made no profits" (R. 429, 448; Exs. A, E), for example, despite the fact that the Tax Court redetermined taxable net income for each in the sums of \$8,203.32 and \$9,488.13 for that year (Tr. 61, 81), respectively. The mere suggestion that a person of taxpayer Rose's legal and business capacities could have taken in individually, as well as through his various corporate and other business enterprises, and personally handled over a period of four successive years a total sum in excess of \$80,000, an average of more than \$20,000 a year, and still have reported only approximately \$37,000, an average of only \$9,250 annually, without concealment in mind for those years, stretches one's imagination beyond credulity. During the years 1939 to 1941, inclusive, for example, taxpayer Rose had deposited and withdrawn approximately \$60,000 in his three special accounts and approximately \$77,500 in Lori's account. (R. 430-431, 445.) During all years taxpayer Rose received professional fees, of which, typically, \$44,227 received in the years 1939 and 1941 he failed to deposit in his personal bank accounts, or report in his returns for those years. (R. 442.)

In *Rogers v. Commissioner*, 111 F. 2d 987, the court stated (p. 989):

It is conceivable that taxpayers may make minor errors in their tax returns, or, owing to different or contradictory theories of tax computation, calculate returns which differ greatly in result from the Commissioner's assessments. Here petitioners do not have that excuse. Discrepancies of 100% and more between the real net income and the reported income for three successive years strongly evidence an intent to defraud the Government. The Board did not err in deciding that 50% penalties should be assessed.

To the same effect, see *Commissioner v. Dyer*, 74 F. 2d 685 (C.A.2d), certiorari denied, 296 U. S. 586 (where the court said (p. 686): "Could any doubt exist, it is laid to rest by the repetition of the ritual in the second year"); *Seifert v. Commissioner*, 157 F. 2d 719 (C.A.2d); *Harris v. Commissioner*, 174 F. 2d 70, 72 (C.A.4th).

In *Gano v. Commissioner*, 19 B. T.A. 518, the Board of Tax Appeals stated (p. 533):

A failure to report for taxation income unquestionably received, such action being predicated on a patently lame and untenable excuse, would seem to permit of no difference of opinion. It evidences a fraudulent purpose.

In these circumstances, it is apparent that the whole situation here indicates quite clearly a *continuing* studied plan of fraud whereby the taxpayers, by failing to keep adequate records of their receipts and disbursements and the segregation thereof for tax purposes (R. 434, 452) succeeded in concealing most of their taxable income from the taxing authorities, to the end that it *appeared*, as they contended in the Tax Court (R. 450), that their "taxable income was no greater than that reported" for all taxable years. After all, taxpayer Rose did use Lori's account as a "sanctuary" to prevent his *creditors* from further attaching his accounts,

as previously. (R. 431.) He "may be presumed to intend the necessary and natural consequences of his acts." *Myres v. United States*, 174 F. 2d 329, 334 (C.A.8th), certiorari denied, 338 U. S. 849. Hence, since the taxpayers here followed the same plan or course of conduct through all the taxable years to defraud the Government of taxes due by grossly understating their income (R. 452), their "fraudulent intent" or motive for each particular year's acts may properly be shown by the "evidence of other [years'] acts and doings of the party of a kindred character". *Wood v. United States*, 16 Pet. 342, 360; *Himmelfarb v. Commissioner*, 175 F. 2d 924, 941 (C.A.9th), certiorari denied, 338 U. S. 860; *Rogers v. Commissioner*, 111 F. 2d 987, 989 (C.A. 6th); *Malone v. United States*, 94 F. 2d 281, 287 (C.A.7th), certiorari denied, 304 U. S. 562. Consequently, a consideration of all the evidence affords clear and convincing proof that the taxpayers knowingly and "consistently cheated the Treasury" in evading their income taxes for all taxable years involved. *Seifert v. Commissioner*, 157 F. 2d 719 (C.A.2d). As aptly stated by the court in *Heyman v. Commissioner*, 176 F. 2d 389, 394 (C.A.2d), certiorari denied, 338 U.S. 904, "We think the situation as a whole was shown to have been instinct with fraud and that the finding of the Tax Court, far from being erroneous, was plainly right." It follows that the Commissioner's determination and the Tax Court's findings of fraud with intent to evade taxes must be accepted as correct. Section 293 (b), Internal Revenue Code; *Rogers v. Commissioner*, *supra*, p. 989; *Hoefle v. Commissioner*, 114 F. 2d 713 (C.A.6th); *Cohen v. Commissioner*, 9 T.C. 1156, affirmed, 176 F. 2d 394 (C.A. 10th); *Halle v. Commissioner*, 175 F. 2d 500, 503 (C.A.2d), certiorari denied, 338 U. S. 949; *Harris v. Commissioner*, 174 F. 2d 70, 73 (C.A.4th).

The cases cited by the taxpayers (Br. 42-43) are distinguishable. Moreover, since each fraud case necessarily turns upon its own peculiar facts, their cases do not help. As the court stated in *Eisenberg v. Commissioner*, 161 F. 2d

506, 510 (C.A.3d), certiorari denied, 332 U. S. 767, in respect of cases involving strictly fact questions—

Little can be accomplished toward ultimate determination of the tax responsibility, at least in this class of cases, by ferreting out analogous parts of other cases, particularly since “no one fact is decisive.” It is well-settled that the Tax Court’s determination, if supported by the facts, is conclusive. That we would not be inclined to draw the same conclusions or make the same inference is of no significance whatever. * * *

Suffice it to say, a situation exists here comparable to that in *Rogers v. Commissioner*, *supra*, where the taxpayer reported less than one-half of his income, and the court stated (p. 989) that:

The Board’s finding is one of fact, and, if supported by clear and convincing evidence, should be affirmed. Such clear and convincing evidence [of fraud] existed here.

In view of the foregoing, it is clear that, contrary to the taxpayers’ contentions, there is an abundance of evidence, clear and convincing, sustaining the Tax Court’s findings of fraud, and since they have not shown them to be in any wise erroneous, the Tax Court’s decisions to such effect, under the provisions of Section 293 (b) of the Revenue Act of 1938 and of the Internal Revenue Code, should be affirmed by this Court.

CONCLUSION

The decisions of the Tax Court in respect of all the taxpayers, individual and corporate, are correct, and should therefore be affirmed upon review by this Court.

Respectfully submitted,

Theron LaMar Caudle,
Assistant Attorney General.

Ellis N. Slack,
S. Dee Hanson,
Special Assistants to the Attorney General.

FEBRUARY, 1951

APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(c) *Taxes Generally*.—Taxes paid or accrued within the taxable year, except—

* * * *

(4) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; * * *

* * * *

SEC. 51. INDIVIDUAL RETURNS.

* * * *

(b) *Husband and Wife*.—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. * * *

* * * *

Internal Revenue Code:

SEC. 21. NET INCOME.

(a) *Definition*.—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * *

(26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or

interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(e) *Distributions by Corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

* * * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * * *

(1) [As amended by Sec. 121 (c) of the Revenue Act of 1942, *supra*] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect

of any property shall be as provided in section 114 * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

- (1) Personal, living, or family expenses;
- (2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;
- (3) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made;

* * * * *

(26 U.S.C. 1946 ed., Sec. 24.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such

amounts are to be properly accounted for as of a different period. * * *

*

*

*

*

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 43.)

SEC. 45. ALLOCATIONS OF INCOME AND DEDUCTIONS.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal

officer and by the treasurer, assistant treasurer, or chief accounting officer. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 52.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer*.—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U.S.C. 1946 ed., Sec. 54.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property*.—The basis of property shall be the cost of such property; * * *

* * * * *

26 (U.S.C. 1946 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation*.—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U.S.C. 1946 ed., Sec. 114.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) *Capital assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business) * * *

* * * * *

(5) *Long-term capital loss*.—The term “long-term capital loss” means loss from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such loss is taken into account in computing net income;

*

*

*

*

(9) *Net long-term capital loss*.—The term “net long-term capital loss” means the excess of long-term capital losses for the taxable year over the long-term capital gains for such year.

(b) *Percentage Taken Into Account*.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66-2/3 per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

*

*

*

*

(26 U.S.C. 1946 ed., Sec. 117.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

*

*

*

*

(b) *Fraud*.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U.S.C. 1946 ed., Sec. 293.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect to such issue shall be upon the Commissioner.

(26 U.S.C. 1946 ed., Sec. 1112.)

The above-quoted provisions of the Internal Revenue Code are substantially the same as the corresponding sections of the Revenue Act of 1938. Hence, references to these sections are, for convenience, to the Internal Revenue Code only.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 23 (c)-1. *Taxes*.—* * *. In general taxes are deductible only by the person upon whom they are imposed. * * *

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-1. *What included in gross income*.—

* * * *

If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, regardless of whether the transfer is in the guise of a sale or exchange, such shareholder or employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value to the extent that such difference is in the nature of (1) compensation for services rendered or to be rendered or (2) a distribution of earnings or profits taxable as a dividend, as the case may be. * * *

* * * *

SEC. 19.22 (a)-3. *Compensation paid other than in cash*.—If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. * * *

SEC. 19.23 (a)-1. *Business expenses*.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business * * *. Double deductions are not permitted. * * *

SEC. 19.23 (l)-2. *Depreciable property*.—* * * It [depreciation] does not apply * * * to land apart

from the improvements or physical development added to it. * * *. The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business. * * *.

SEC. 19.41-1. *Computation of net income.*—* * *. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. * * *. If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

SEC. 19.41-3. *Methods of accounting.*—* * *. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. (See section 54 and section 19.54-1.) Among the essentials are the following:

* * * *

(2) Expenditures made during the year should be properly classified as between capital and expense; * * *

* * * *

SEC. 19.43-2. *When charges deductible.*—Each year's return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. The expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year. A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he cannot deduct them from the income of the next or any succeeding year. * * *

SEC. 19.54-1. *Records and income tax forms.* Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. Such books or records shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue laws.

Articles 22 (a)-1, 22 (a)-3, 23 (a)-1, 23 (l)-2, 41-1, 41-3, 43-2 and 54-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, contains provisions substantially the same as the above-quoted provisions of Treasury Regulations 103. Hence, references to these sections are, for convenience, to Treasury Regulations 103 only.

No. 12539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED: ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF.

GEORGE T. ALTMAN,

327 General Petroleum Building,

Los Angeles 17, California,

Attorney for Petitioners.

TOPICAL INDEX.

	PAGE
Introductory statement	1
I.	
Respondent fails to support the prima facie correctness of his determinations when he relies primarily on obviously erroneous net worth computations.....	3
II.	
The proof is clear that the Commissioner and the Tax Court erroneously included in Rose's gross income, by way of the disbursements out of the Lori account, monies borrowed by Rose and deposited in the Lori account, and fees of his deposited in that account but elsewhere included in his gross income	9
III.	
The financial statements on which the Tax Court relied but which it misread show the Tax Court's redeterminations to be erroneous and the petitioners' returns to be correct.....	14
IV.	
Rose's use of his own property, whether held in fee or in equity, is not income.....	24
V.	
The wife's community half of Rose's professional earnings for 1938 should not be taxed to Rose since no joint return was filed for that year.....	25
VI.	
Clear evidence shows the time Rose acquired the Silver King Coalition Mines stock as 1936, and its basis, the value when acquired, as \$8 per share, or \$9,600.....	27

VII.

Recorded encumbrances on the Villa Courts are evidence of their basis, and depreciation should have been allowed thereon	29
--	----

VIII.

Lori has no taxable income of its own since, as respondent states, Rose is the beneficial owner and income is taxed to the beneficial owner of property.....	30
--	----

IX.

The record clearly shows that Rose paid expenses of Lori from monies received by him from Lori; and respondent's answer that petitioners have failed to segregate the expenses as between the Villa Courts and Brevoort's hotel is no answer since income from both sources was taxed to Lori, also without segregation	34
---	----

X.

There should be excluded from Lori's income the eleven specific non-income items identified in the record and set out under Point V of petitioners' opening brief, not a one of which items is specifically challenged in respondent's brief.....	36
---	----

XI.

Lori is entitled to an excess profits credit since that issue was timely raised before the court below and involves strictly a matter of computation.....	37
---	----

XII.

Petitioners cannot be guilty of fraud when errors in the Commissioner's and the Tax Court's computations show the correct taxable income to be very close to what the taxpayers reported and where there was no intent to evade taxes.....	38
Conclusion	39

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Avery v. Commissioner, 292 U. S. 210.....	27
Bell v. Commissioner, 139 F. 2d 147.....	16
Commissioner v. Phipps, 336 U. S. 410, 69 S. Ct. 616.....	20
Crane v. Commissioner, 331 U. S. 1, 67 S. Ct. 1047.....	30
Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719.....	26
Spring City Foundry v. Commissioner, 292 U. S. 182, 54 S. Ct. 644	19, 27
Stern Bros. & Co. v. Commissioner, 16 T. C. No. 40.....	37
United States v. Pleasants, 305 U. S. 357.....	37
United States v. Malcolm, 282 U. S. 792.....	27
Weiss v. Wiener, 279 U. S. 333, 49 S. Ct. 337.....	20
Zimmermann v. Commissioner, 36 B. T. A. 618.....	37

STATUTES

Revenue Act of 1938, Sec. 51(b).....	26
Revenue Act of 1938, Sec. 276(a).....	26
Rules of the Tax Court, Rule 19(e).....	15
Rules of the Tax Court, Rule 50.....	38
Rules of Tax Court, Rule 61	15

TEXTBOOKS

1 National Tax Journal, No. 4 (Dec., 1948), Seghers, Tax Accounting Compared with Recognized Accounting Prin- ciples	19
Reimer, Differences in Net Income for Accounting and Fed- eral Income Taxes.....	19
4 Tax Law Review, No. 3 (March, 1949), p. 343, Lasser and Peloubet, Tax Accounting vs. Commercial Accounting.....	19

No. 12539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED: ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF.

Introductory Statement.

Petitioners in this introductory statement examine into the general structure, content and apparent purpose of respondent's brief. They do this with considerable hesitancy, and not a little trepidation, but they assure the Court that their only purpose is to enable the Court better to understand their own argument and that of respondent.

Petitioners in their opening brief pointed out specific errors made by the Tax Court. In each case the item involved was precisely stated, with precise citation to the

record. It was petitioners' aim to bring light to the record, so that this Court could see each item in clear relief.

But respondent has obviously a different purpose. With two minor exceptions, which will be noted in the course of this brief, respondent's entire argument, spread over 57 pages of more than 400 words to the page, is a mass of vague generalizations, distortions, and irrelevant citations. Respondent complains again and again of the contradictions and confusion in the record. (Br. 35-36, 38, 49, 50-52, 55, 63, 67, 70, 80-81.) That record, however, is in no small part respondent's own product. Certainly now he makes no effort to sharpen or illuminate any part of it. His primary effort appears rather to confound and confuse. It is obviously his purpose, convinced that petitioners' case will flourish in the light, to pour darkness upon the record, in order that petitioners may be empaled upon their burden before this Court.

It is clear also that the length of respondent's brief and the time which they took to write it resulted primarily from their total failure to explain away their own Exhibit S. Petitioners would be willing to stake their entire case upon that exhibit. They will in this brief, nevertheless, examine each part of respondent's argument, following the order of the subjects in respondent's brief.

I.

Respondent Fails to Support the Prima Facie Correctness of His Determinations When He Relies Primarily on Obviously Erroneous Net Worth Computations.

Respondent, under point I, pages 27-36, of his brief, opens his argument with a detailed and exhaustive effort to sustain the *prima facie* correctness of the Commissioner's deficiency determinations, a subject which petitioners treated under point XI, pages 37-39, of their opening brief.

Petitioners reaffirm all of the contentions made on that point in their opening brief. They now have one to add, brought out by point I of respondent's brief, and that is the Commissioner's reliance to a controlling extent in his deficiency determinations upon an erroneous reading of Exhibit S, which consists of financial statements showing the increases in petitioners' net worth. So great was his error in his reading of that exhibit that, in another part of his brief, point III, he now attempts to disown it. That error alone, even if there were no others, is sufficient to overcome the presumption of correctness of the Commissioner's determinations.

In the course of his argument on the subject of that presumption respondent states at several points that his deficiency determinations were based on increases in the petitioners' net worth. We quote:

"Accordingly, the question presented in respect of each of the taxpayers is whether the Tax Court properly found, upon all the evidence, that they failed, in large part, to overcome the presumptive correctness of the Commissioner's determination that the

amounts of their taxable income realized for the years 1938 to 1941, inclusive, were, *on the basis of the increases ascertained in their net worth*, not less than the sums upon which the respective deficiencies were computed." (Br. 28. Italics added.)

"In the absence of such records and assistance, however, the Commissioner determined the *net worth* of each of the taxpayers as of the beginning and end of each taxable year. [R. 436-440, 445; Exs. N, O and P.]" (Br. 32. Italics added.)

"As to the community net income of the individual taxpayers, Rose and his wife, the Commissioner subtracted from the increases in their *net worth* ascertained for each year all the allowable identified deductions, as business expenses, transfers between the various bank accounts, charge-back by the banks, divers and sundry payments to others, etc. He added thereto amounts considered reasonably sufficient to cover the taxpayers' personal, living and family expenses, not otherwise reflected in the computations. Section 24(a)(1), Internal Revenue Code (Appendix, *infra*). He thereby, upon appropriate adjustments made, arrived at their community net income and the resulting deficiencies asserted for each year. [R. 397-400, 436-440, 442-443, 449-450; Ex. N.] In so doing, 'No reasonable doubts were resolved against the taxpayer, while the audit and analysis made by the Commissioner seems to have been made as accurate as the circumstances here permitted.' *Halle v. Commissioner*, 175 F. 2d 500, 502-503 (C. A. 2d), certiorari denied, 338 U. S. 949. It is significant, moreover, that the increases in the taxpayers' individual *net worth* and their total community net income as thus determined by the Com-

misioner and redetermined by the Tax Court for the taxable years, while substantial, were far less than those shown by taxpayer Rose himself in his annual statements of financial condition, submitted to his bank for credit purposes, covering substantially the same period involved here. [R. 444, 450-451; Ex. S; Pet. Br. 15-21.]” (Br. 34. Italics added.)

Respondent in the same connection cites multitudinous authority in support of the net worth method. Again we quote:

“In many cases where taxpayers, engaged in business, have failed to keep proper books of accounts and records of income-producing transactions, the courts have sustained the Commissioner’s determinations of income *upon the basis of the increase in the taxpayer’s net worth* for each year under review, and adding thereto a reasonable estimated amount, not reflected in such increase, to cover personal and living expenses. *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C. A. 9th); *Carmack v. Commissioner*, 183 F. 2d 1 (C. A. 5th), certiorari denied, 340 U. S. 875; *Burka v. Commissioner*, 179 F. 2d 483, 484-485 (C. A. 4th); *Halle v. Commissioner*, 175 F. 2d 500, 503 (C. A. 2d), certiorari denied, 338 U. S. 949; *Massacone v. Commissioner*, decided May 20, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,084), affirmed *per curiam*, 175 F. 2d 778 (C. A. 3d); *Harris v. Commissioner*, 174 F. 2d 70 (C. A. 4th); *Stinnett v. United States*, 173 F. 2d 129 (C. A. 4th), certiorari denied, 337 U. S. 957; *Jelasa v. United States*, 179 F. 2d 202, 203 (C. A. 4th); *Kenney v. Commissioner*, 111 F. 2d 374, 375 (C. A. 5th); *Hoefle v. Commissioner*, 114 F. 2d 713, 714 (C. A. 6th); *Brodella v. United States*, 184 F. 2d 823, 824-

825 (C. A. 6th); *Hague Estate v. Commissioner*, 132 F. 2d 775, 777-778 (C. A. 2d), certiorari denied, 318 U. S. 787." (Br. 31-32. Italics added.)

The only evidence in the record—absolutely the only evidence—showing net worth or increases in net worth is Exhibit S. No other exhibit, whether or not cited in the above quotations, no part of the testimony except that identifying the said Exhibit S [R. 89-91], no part of the findings and opinion except those relating to the said Exhibit S [R. 444, 450-451], makes any reference whatever to net worth or increases in net worth. Yet since this very exhibit, introduced into evidence by respondent, is now the major basis of petitioners' case, respondent contends in a different part of his brief, point III (Br. 41-44), that a correct application of that exhibit cannot now be made because, and again we quote:

"First, this issue was neither alleged in the taxpayers' petitions for redetermination of the deficiencies involved [R. 7-10, 498-505, 513-524], nor was it presented to or considered by the Tax Court [R. 426-455]. Neither was it assigned as error [R. 544-546], nor included in the taxpayers' statement of points intended to be relied on upon review [R. 549-560]. Consequently, this Court is not called upon to decide the issue but, under the authorities, is duty bound to pass it." (Citing numerous cases. Br. 41-42.)

It will be shown herein under point III that the above statement is wholly erroneous. The only purpose of quoting it here is to show that while respondent rests the *prima facie* correctness of his computations on the net

worth method, he disowns, in another part of his brief, and contends this Court is duty bound to pass, *the only evidence* bearing on petitioners' net worth and the increases therein.

Next under point III, respondent, recognizing that this Court might nevertheless consider the evidence contained in Exhibit S, contends as follows:

“Contrary to the taxpayers' contention that the statements in question were adduced in evidence by the Commissioner *in corroboration* of his determinations of their increases in net worth, the fact is, of course, that they were introduced merely for *comparative* purposes as showing the taxpayers' phenomenal increase in wealth [R. 444, 450-451; Ex. S, pp. A-3 and A-9], far beyond the aggregate income disclosed by taxpayer Rose and wife in their tax returns [Exs. E-J], as well as that redetermined by the Tax Court (Pet. Br. 20).” (Br. 42.)

Since Exhibit S is the *only* evidence of petitioners' increases in net worth, obviously it was not introduced by the Commissioner for the purpose of *corroborating* his determinations of petitioners' increases in net worth. Nowhere in their brief do petitioners say that it was. And if, as respondent now contends, the Commissioner introduced Exhibit S, not “*in corroboration*” but “*merely for comparative purposes*,” may it not be proper to inquire what the *comparison* is for in this case if not to *corroborate* something.

Thus respondent has attempted to disown, and if not successful in disowning, at least to belittle, his own evidence and his *only* evidence in respect of petitioners'

increases in net worth. Yet his entire argument in support of the *prima facie* correctness of his determinations is that perforce they were based on evidence of increases in net worth and that the net worth method has in numerous cases been accepted as valid. All there is otherwise of his 10-page answer to petitioners' 2-page argument against the presumption of correctness of the Commissioner's determinations in this proceeding is the following:

"There is no basis in the record for these contentions." (Br. 29.)

In their short statement on this issue, petitioners cited 4 cases and quoted from 2 of them. In his lengthy answer on this issue—5 times as long in number of pages and 8 times as long in number of words—respondent cited 29 cases but failed to make even a single reference, by way of distinction or otherwise, to one or more of the cases cited by petitioners. The reason is obvious. Respondent's reply is but an elaborate evasion, a compound of irrelevant argument and irrelevant authorities. Its only pertinence lies in its content of statements showing his reliance in his deficiency determinations on Exhibit S, despite his effort in another part of his brief to disown it. Petitioners submit again, as they did in their opening brief, page 39, that the Tax Court should have granted petitioners' motions for rehearing, that it should have disregarded the Commissioner's deficiency determinations, and should have made an independent redetermination of the net income of petitioners.

II.

The Proof Is Clear That the Commissioner and the Tax Court Erroneously Included in Rose's Gross Income, by Way of the Disbursements Out of the Lori Account, Monies Borrowed by Rose and Deposited in the Lori Account, and Fees of His Deposited in That Account but Elsewhere Included in His Gross Income.

We come now to the Tax Court's inclusion in the gross income of Rose, of all disbursements by Lori to him, for his account, or unexplained, without at the same time deducting the amounts of said disbursements made out of his own monies deposited in the Lori account. This subject is covered by respondent in point II, pages 36-41, of his brief, and by petitioners in point I, pages 10-14, of their opening brief.

Respondent erroneously assumes that Rose "does not dispute the item of \$15,873.23 thus included in his income by the Commissioner" for 1938. (Br. 37.) Apparently this same erroneous assumption is made in respect of the other years. As it will be seen under point III herein, petitioners dispute the entire structure of the Commissioner's determinations. We are concerned here, however, only with these specific amounts included in Rose's gross income, to the extent to which they represent Rose's own money, where such money was either (a) non-income or (b) income elsewhere included.

The non-income amounts consist of monies borrowed by Rose totaling \$3,500 for 1939, \$1,456.76 for 1940 and \$5,805.32 for 1941. Respondent concedes that the loans specified were made by Rose and that like amounts "were *concurrently* deposited in Lori's account." (Br. 37. Ital-

ics added.) The Tax Court found that Rose used all of the bank accounts in his own name, "as well as the Lori account, for his personal deposits and expenditures. . . ." [R. 431.]

But respondent strains for a different explanation of these deposits. They might, he says, represent taxable transactions. (Br. 37.) What possible taxable transactions they might represent he does not suggest. Other than this bank account the record shows nothing whatever in Lori's name except the Villa Courts, and no operations of any kind in its name except in connection with the Villa Courts. The beneficial owner of the Villa Courts was Rose [R. 433, 441], and throughout the entire 4-year period involved those courts were never sold. [R. 432-434.] Yet respondent suggests that perhaps the loans made by Rose, with deposit of identical amounts, in each case on the very same day, in the Lori account, an account which he used for "his personal deposits and expenditures," might represent taxable transactions.

Respondent suggests also that these deposits might be monies he owed Lori. (Br. 37.) For what? If Rose borrowed money from Lori, then the payments by Lori to him as such loans should be excluded from the totals of Lori disbursements included in his gross income. Either way the result is the same.

Respondent suggests one other possible explanation of these deposits. He says there is no showing that Rose, upon depositing these amounts in the Lori account, "did not thereafter continue to draw checks in smaller amounts against such total deposits for his own purposes until the

full amounts thereof were exhausted." (Br. 37.) Of course he drew such checks. But these very checks, as shown in petitioners' opening brief, pages 10-14, were included in arriving at the totals of Lori disbursements included in Rose's gross income. It is just that of which we complain. Just because Rose used the Lori account in which to deposit these borrowed monies and then pay them out for various purposes of his own does not justify including the payments so made in his gross income. Clearly the additions to Rose's gross income based on total payments out of the Lori account to him or for his benefit should be reduced by the amount of such borrowed monies.

Respondent makes a similar mistake as to the income item of \$6,500. He says that this amount was part of a legal fee of \$17,500. (Br. 39.) True, but the \$17,500 was separately included *in its entirety* in respondent's computation of Rose's gross income. [R. 438.] Nowhere was the \$6,500 deducted. Yet, in precisely the same manner as in connection with the loans explained above, that amount was deposited in the Lori account and the disbursements therefrom were included in the totals of Lori disbursements included in Rose's gross income. As a result, the \$6,500 was included in his gross income twice, once as a part of the \$17,500 fee and again as a part of the Lori disbursements.

We should also like to note that in the course of his argument under this heading respondent makes the assumption that the \$17,500 fee was not taken into consideration by Rose in computing the net income reported on his returns. (Br. 39.) Respondent's only citation therefor is the 1939 return, Exhibit F, which lends no support to that assumption. It appears clear now that the contrary of that assumption is true. The Commissioner

himself, including in Rose's professional income for 1939 this \$17,500 fee and all of his bank deposits except transfers from the Lori account, was able to increase Rose's professional net income for that year over the amount thereof shown on his return by only \$8,195.90. [R. 527.] The bank deposits in total were \$30,698.96 [R. 438], and the transfers from the Lori account excluded therefrom, \$12,299.65 [R. 438], leaving a net total of \$18,399.31, which the Commissioner added to the \$17,500 fee to determine Rose's gross professional receipts for 1939. [R. 528.] Still the Commissioner came out with an increase for that year of only the said amount of \$8,195.90 in Rose's professional net income. The Commissioner, it is true, increased Rose's 1939 income also by \$17,776.63 as derived from Lori deposits [R. 439], but the Tax Court allowed \$10,972.15 against this [R. 441—total of the items shown under 1939], and clear duplications of another \$10,000 are shown in petitioners' opening brief, page 12, so that actually the Commissioner should have deducted \$3,195.52 instead of adding \$17,776.63 in respect of income from the Lori deposits. Rose therefore must have taken the \$17,500 fee into consideration in making up his returns. Either it was included somewhere in the deposits or otherwise added in.

We come now to an exception which proves the rule. In respect to the item of \$1,200 pointed out by petitioners in their opening brief, pages 13-14, petitioners concede error. Respondent correctly observes that in computing Rose's professional income from Rose's deposits the Com-

missioner allowed a deduction for the 1941 salary of \$1,200 as "salary from Lori assumed to be in deposits." (Br. 39.) We should like to point out, however, that petitioners' error in that respect resulted from a variance as between 1940 and 1941 in the Commissioner's handling of that item. In the Commissioner's computation of Rose's professional income the amount of that salary item, \$1,200, was excluded for both 1940 and 1941. [R. 438.] However, this was offset for 1940 by reducing the deduction for "transfers from Lori bank acct." from \$2,681.90 [R. 14] to \$1,481.90. [R. 438.] No similar offset was made for 1941. The transfers from the Lori account of \$2,-616.00 [R. 530] were deducted in full. [R. 438.] As a result, for 1940, the exclusion of this salary item was made by the Commissioner in the computation of Rose's non-professional income [R. 14], and for 1941, in the computation of his professional income. [R. 438.] Petitioners noted the exclusion for 1940 [R. 14], and failing to find the 1941 amount excluded in the corresponding computation for that year, assumed that it was not made. Petitioners nevertheless apologize for complaining in respect to that item.

The other adjustments requested by petitioners under point I of their opening brief, pages 10-14, being \$10,000 for 1939, \$1,456.76 for 1940, and \$5,805.32 for 1941, stand completely untouched by respondent's answer. These are clear and specific errors in the Commissioner's computation. Petitioners submit again that they must be allowed.

III.

The Financial Statements on Which the Tax Court Relied but Which It Misread Show the Tax Court's Redeterminations to Be Erroneous and the Petitioners' Returns to Be Correct.

As it was observed under point I herein, respondent in his attempt to sustain the *prima facie* correctness of his deficiency determinations stated again and again that those determinations were based on petitioners' increases in net worth. This is even true of respondent's summary of argument under that point. There he states:

"They have failed to meet such burden. The Commissioner determined and the Tax Court redetermined the taxpayers' income by ascertaining the total increases in their net worth, and adding thereto estimated reasonable amounts, not reflected in such increases, to cover their personal and living expenses." (Br. 20.)

As it was further observed in point I herein, respondent's Exhibit S is the sole evidence of increases in net worth. Indeed, it is also the sole evidence from which "estimated reasonable amounts" to cover Rose's "personal and living expenses" can be determined. Yet respondent under point III attempts to disown Exhibit S, contending that it was an "issue" not raised in the Tax Court, and that in consequence this Court is "duty bound to pass it."

Exhibit S is not an issue; it is a piece of evidence introduced in the Tax Court by the Commissioner himself, and all that petitioners now ask is that it be read correctly. If the Tax Court's misreading of that exhibit be an issue then obviously that issue could not have arisen

until after the Tax Court had rendered its opinion. That opinion was rendered January 6, 1949 [R. 4], and a copy thereof was served January 7, 1949. [R. 4.] On Monday, February 7, 1949 [R. 4], within the 30-day period allowed by Rule 19(e) of the Tax Court's rules (as amplified by Rule 61 thereof as to computation of time), a motion for rehearing was filed in the Tax Court. As that motion will show, it was filed by present counsel for petitioners and was his first act in this proceeding. His appearance was filed separately on February 14, 1949. [R. 4.] That motion contains *inter alia* the following statement:

"C. The Court has sustained the respondent's allegation of fraud principally on the basis of certain statements presented by petitioners to the Citizens Bank. (Memorandum Findings of Fact and Opinion, page 18.) *The increases in net worth reflected by the said statements were determined on the basis of accrual and current valuation, whereas the income tax returns reflect only income fully realized in cash or its equivalent. The Court's findings wholly fail to consider this point.* Petitioners are prepared to present evidence in respect to said statements showing their consistency with the allegations made by them in this proceeding."* (Italics added.)

*Petitioners assume that they are entitled to make reference to this motion for rehearing, which is included in the record before this Court but is not a part of the printed record, under the order to allow reference to documents without printing. [R. 565-7.] If they are not so entitled they now ask leave to have it printed as a supplement to the printed record. Of course, respondent has a copy of the document since a copy was necessarily served upon him by the Tax Court, and he can check the accuracy of petitioners' quotation.

Clearly then this issue was presented to the Tax Court. In *Bell v. Commissioner*, 139 F. 2d 147 (1943), the Court of Appeals for the Third Circuit stated, at page 148:

“The Commissioner stresses that the petitioner raises the pertinency and applicability of Sec. 112 (b)(5) for the first time in this court on his pending petition for review of the Tax Court’s decision. Such, however, is not exactly the situation. It is true that Sec. 112(b)(5) was not relied upon by the taxpayer either in his petition from the Commissioner’s determination or at the hearing thereon before the Tax Court. It is also true that neither party brought that provision of the Revenue Act or the Supreme Court’s construction thereof in the *Cement Investors* case to the attention of the Tax Court prior to its decision. *However, the petitioner did move timely for a reconsideration of the Tax Court’s decision and specified as the reason for his motion the pertinency of Sec. 112(b)(5). In that way the point now advanced by the petitioner was raised below; and the Tax Court terminated the matter by entering an order denying the petitioner’s motion for a reconsideration of the decision.*

“This is not a case of a party who, unsuccessful below, ‘add(s) here for the first time another string to his bow.’ (Cf., *Helvering v. Wood*, 309 U. S. 344, 349.) Even that may be done where there has not been an express waiver of the ground later advanced. See *Hormel v. Helvering*, 312 U. S. 552, 557-559. We think that, under the circumstances here shown, Sec. 112(b)(5) is presently available to the petitioner.” (Italics added.)

Considering especially the fact that here the issue involved, if it can be called an issue, is the Tax Court’s incorrect reading of an exhibit introduced at the trial by

the respondent, an issue therefore which could not have been raised before the Tax Court, except by motion filed after that court's opinion had been rendered, it must be clear that such issue was timely raised.

We should like to note next a misinterpretation by respondent in this connection of petitioners' opening brief. Respondent says:

"Hence, in so far as the record shows, the taxpayers' returns grossly understating their taxable net income by more than \$41,800 (Br. 20), must necessarily be incorrect to such extent at least." (Br. 43.)

Petitioners are completely unable to determine where such a statement appears on page 20 of their opening brief. Apparently the figure of \$41,800 refers to the difference of \$41,833.45 between the following two amounts appearing at the bottom of the said page 20: (1) the total of \$37,706.61 reported by the petitioners as net income for the four years involved, and (2) the total of \$79,540.06 redetermined for those years by the Tax Court. But nowhere does petitioners' brief say that the taxpayers' returns understated their net income by that amount. Obviously also respondent is begging the question; it is that very difference between the taxpayers' returns and the Tax Court's redetermination which petitioners are contesting in this proceeding.

Coming now to the merits on this point, we are no longer concerned with whether the Commissioner used Exhibit S "in corroboration" of anything, or for "comparative" purposes. We are concerned with what Exhibit S shows. Respondent in regard to the statements contained in that exhibit, says:

"The statements disclose an aggregate increase in taxpayer Rose's net worth of \$75,000 and total in-

come of \$85,300 for the four-year period involved, and they were certified by taxpayer Rose 'as being a full, true and correct statement of * * * [his] financial condition on the date given,' and 'to be true and correct to the best of my knowledge and belief.'¹¹ [Ex. S, pp. A-3 to A-9; R. 444.] As against such admitted total income, the Tax Court redetermined the community net income of taxpayers Rose and wife to be only the total sum of \$79,540.06 for the entire four years involved [R. 455-456, 512-513, 541; Pet. Br. 20]. The taxpayers, however, departing from Rose's *certified* statements currently submitted to his bank during those years, reported only \$37,706.61 as their entire community net income for such period, a difference in excess of \$47,500 from that shown by the statements (Pet. Br. 20-21)." (Br. 42-43.)

The footnote indicated reads as follows:

"¹¹It must be assumed, we submit, that taxpayer Rose's certified statements submitted to his own bank from year to year represented his *true* financial condition for the four-year period involved for, as the Tax Court pointed out [R. 450-451], the falsification of such statements constitutes a crime under California law. See Section 532 ('False Pretenses', etc.) and Section 532a ('False Financial Statements', etc.) of Deering's Penal Code of California (1949)." (Br. 42.)

It is clear, however, that the total of \$79,540.06 arrived at by the Tax Court, and of \$37,706.61 shown by the taxpayers on their returns, as the net income of Rose and his wife for the four years involved, were determined on a cash basis. [R. 428.] It is equally clear that the total income of \$85,300 for the same period shown by the

statements contained in Exhibit S was determined on the accrual basis. Respondent does not question this fact. (Br. 43.)

It is not at all uncommon for a taxpayer to use the cash basis for tax purposes and the accrual basis for credit purposes. Nor is it in the slightest improper. The differences between accounting and business practice on the one hand, and principles applicable under the income tax laws on the other, are so numerous that books have been written on the subject. See, for example, "Differences in Net Income for Accounting and Federal Income Taxes," by Clarence F. Reimer, Ph.D., C.P.A. For articles on the subject, see "Tax Accounting Compared with Recognized Accounting Principles," by Paul D. Seghers, *National Tax Journal*, Volume I, No. 4, December, 1948; also, "Tax Accounting vs. Commercial Accounting," by J. K. Lasser and Maurice E. Peloubet, *Tax Law Review*, Vol. 4, No. 3, March, 1949, page 343.

The courts have also taken cognizance of this situation in many decisions. Thus, in *Spring City Foundry v. Commissioner*, 292 U. S. 182, 54 S. Ct. 644 (1934), the Supreme Court stated, 292 U. S. at p. 189:

"Petitioner insists that 'good business practice' forbade the inclusion in the taxpayer's assets of the account receivable in question or at least the part of it which was subsequently found to be uncollectible. But that is not the question here. *Questions relating to allowable deductions under the income tax act are quite distinct from matters which pertain to an appropriate showing upon which credit is sought.*" (Italics added.)

Again, in *Commissioner v. Phipps*, 336 U. S. 410, 69 S. Ct. 616 (1949), the Supreme Court stated, 336 U. S. at p. 420:

“It is urged upon us that the deficits of the subsidiaries should be subtracted from the earnings and profits of the parent in order to make the tax consequences of the liquidation correspond with corporate accounting practice. The answer is brief. The *Sansone* rule itself, as applied to earnings and profits, has never been thought to be controlled by ordinary corporate accounting concepts; its uniform effect is to treat for tax purposes as earnings or profits assets which are properly considered capital for many if not most corporate purposes, and it has long been a commonplace of tax law that similar divergencies often occur. See *Commissioner v. Wheeler*, 324 U. S. 542, 546; *Putnam v. United States*, 149 Fed. (2d) 721, 726, 1 Mertens, op. cit. Sec. 9.33; Rudick, op. cit. 878-906.”

And in *Weiss v. Wiener*, 279 U. S. 333, 49 S. Ct. 337 (1929), the Supreme Court stated, 279 U. S. at p. 335:

“The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer.”

Clear it is then that Rose placed himself in no conflict with either the federal income tax laws or the Penal Code of California because he prepared his tax returns on a cash basis and his statements for credit purposes on the accrual basis. For respondent to make this contention in the face of a practice so well accepted but emphasizes the frailty of his entire argument.

Now as to what Exhibit S in fact shows, respondent's extremely short answer—a single page out of his entire 93-page brief—is entirely without substance and even without any discernible meaning. He says that “the last of Rose's financial statements coming within this four-year taxable period involved here was the third one which he submitted to his bank on March 1, 1940.” (Br. 43.) Then why does he say on the very page preceding that the “statements disclose an aggregate increase in taxpayer Rose's net worth of \$75,000 and total income of \$85,300 for the *four-year* period involved, . . . ?” (Br. 42. *Italics added.*)

Assuming, nevertheless, that the March 1, 1940, statement is the last one, what does it show? Respondent concedes that it shows accounts receivable, less accounts payable, in the net sum of \$31,250. (Br. 43.) The corresponding amount on the statement for June 11, 1938, is \$5,900, so that during the intervening period of less than two years there was an increase in income accrued but not received of \$25,350. The three financial statements “within” the taxable period involved show his annual income as follows [R. 444]:

6-11-38		\$13,500.00
4-29-39	(in excess of)	10,000.00
3- 1-40	(in excess of)	20,000.00

If one takes those amounts on any consecutive two statements, the most that one has for income for a two-year period is \$30,000. Deduct the increase of income accrued but not received between 6/11/38 and 3/1/40, \$25,350 as computed above, *and all one has left on a cash basis for the two-year period is \$4,650.* Now let us see what the *taxable net income* of Rose and his wife was for substantially the same two-year period, 1938 and 1939,

as shown by the returns, as determined by the Commissioner, and as redetermined by the Tax Court:

		Per Returns*	Per Deficiency Notices*	Per Tax Court Decisions**
1938		None	\$26,374.72	\$ 8,203.21
1939	A. Brigham Rose	\$3,039.92	17,871.36	10,925.28
	Zelletta M. Rose	3,039.92	17,871.36	10,925.28
		<hr/>	<hr/>	<hr/>
		\$6,079.84	\$62,117.44	\$30,053.77

*R. 440.

**The detail appears only in respondent's computation for entry of decision, filed April 12, 1949 [R. 4], in petitioners' statement of points [R. 555], and in petitioners' opening brief, page 20. The said computation of entry of decision is expressly within the order allowing reference to documents without printing. [R. 566.]

No matter how one compares these statements the results are clear. Whether one takes all four statements which the Tax Court cited and on which it relied, that is, the statements dated 6/11/38, 4/29/39, 3/1/40, and 9/21/42 [R. 444], or only the first three of them, as respondent prefers (Br. 43), it is clear that petitioners' returns were right and the Commissioner and the Tax Court were wrong—not only wrong, but so far wrong as to have no semblance of relation to the truth.

The acme of respondent's argument on this point, however, is his following statement:

“Moreover, *no* accounts receivable are shown for the last taxable year (1941) involved here. [R. 444; Ex. S, p. A-7.] Quite plainly, therefore, the last statement Rose submitted to his bank on September 21, 1942, disclosing accounts receivable of \$50,000 *on that date*, does not establish or show *any* accounts receivable for the last taxable year involved here. [R. 444; Ex. S, p. A-9; Pet. Br. 15-21.] Even if adjustment of that statement to the cash basis would

make any difference tax-wise, there is no such statement in evidence covering the last taxable year and, consequently, the record showing nothing to the contrary, the Tax Court's redetermination must stand as correct." (Br. 43.)

Does respondent mean to say, or perhaps just imply, that the record represented by "R. 444; Ex. S, p. A-7," no part of which bears any reference to, or indication of, a financial statement dated in 1941, proves that "*no* accounts receivable are shown" for 1941? He may, indeed, only mean that since there is no financial statement dated in 1941 there is no *evidence* of accounts-receivable for 1941. That would be strange, too, since as respondent concedes (Br. 43), the statement for 3/1/40 shows \$35,000 of accounts receivable and that for 9/21/42 shows \$50,000, and, as the record clearly shows, Rose was in continuous practice during the intervening period. [R. 440.] Also, the Tax Court placed great reliance on the 9/21/42 statement as showing, together with the three preceding statements, Rose's increase in net worth "during the period involved." [R. 444, 451.]

Exhibit S, petitioners again submit, tears down completely respondent's case. Respondent introduced that exhibit, and it is the only evidence which shows the net worth increases upon which he says again and again (Br. 20, 28, 31, 32, 34) his deficiency determinations were based. The Tax Court used that exhibit as a basic factor in its redetermination. [R. 444, 450-51.] Now that that exhibit has turned against respondent he is trying to disown it, and if he cannot do that, then to belittle it, and if he cannot do that, then to distort it. But that exhibit is clear and specific. Petitioners ask that it be treated now, even as respondent has treated it, as the cornerstone of this case.

IV.

Rose's Use of His Own Property, Whether Held in Fee or in Equity, Is Not Income.

Under Point IV, pages 44-46 of his brief, respondent discusses the problem covered by petitioners under their Point VII, page 33, of their brief, that is, the inclusion by the Tax Court in Rose's income of the value of his use of a part of the Villa Courts during the years involved.

On that problem respondent considers only two factors: (1) whether Rose owned the Villa Courts or had "merely an 'equity'" therein, and (2) what the value of the use was. Petitioners never raised any issue in regard to the value of the use. They contested only the includibility. Respondent's argument in respect to the value, beginning in the next to the last line on page 45, followed by his conclusion that the amount was includible, is a clear *non sequitur*, and wholly impertinent.

On the question whether Rose owned the Villa Courts or had "merely an 'equity'" therein, respondent does not explain the difference, nor does he submit a single authority having any bearing on the question. His one-sentence attempt at distinguishing the *Plant* case is likewise wholly without meaning. His argument immediately following on the question of value, tied in misleadingly as a part of his statement in respect to the *Plant* case, but emphasizes his inability to find any basis for distinguishing that case.

Definitely, the value of Rose's use of part of the Villa Courts should not have been included in his gross income.

V.

The Wife's Community Half of Rose's Professional Earnings for 1938 Should Not Be Taxed to Rose Since No Joint Return Was Filed for That Year.

On the question of inclusion in Rose's gross income for 1938 of his wife's community half of his professional earnings, covered by petitioners in Point VIII, pages 34-35, of their brief, and by respondent in Point V, pages 46-48, of his brief, respondent first raises the objection that this issue was not raised in the court below.

As observed under Point III herein, petitioners filed a timely motion for rehearing on February 7, 1949. That motion was denied on May 5, 1949. [R. 4.] On June 8, 1949, and within 30 days after the said denial was served upon petitioners in Los Angeles, petitioners filed, together with and supported by a statement of objections to respondent's computations under Rule 50, a second motion for rehearing. [R. 5.] In the said objections, which were also part of the said second motion for rehearing, under Point VII thereof the issue now being considered was raised in the following language:

"7. As respondent's computations for 1939 and 1941 show, the entire income of Rose was community income. For 1938, however, respondent included in the income of Rose the total community income. This obviously was improper. In any event, therefore, the income of Rose determined by respondent for 1938 should be cut in half."*

This issue was therefore raised before the Tax Court and considered by it.

*This document is expressly within the order allowing reference to documents without printing. [R. 566.]

Nor is this Court wholly without power to review an issue solely because it was not raised below. The issue herein involved is one which is obvious on the face of the record and it is unnecessary for this Court to close its eyes to it. In *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719 (1941), the Supreme Court, distinguishing the case of *General Utilities & Operating Co.*, relied on by respondent here (Br. 47), held that a decision not in accordance with law, even though the issue involved was not raised below, should be modified, reversed or reversed and remanded “as justice may require.”

In any event, it is clear here that the issue involved was raised below and is therefore reviewable by this court.

On the merits of this issue, respondent’s sole contention is that the 1938 return was a joint return. (Br. 46.) It may be observed, however, that even respondent is not sure of this. In another connection (Br. 75, footnote), he states that fraud was not found against Rose’s wife for 1938 because for that year “Rose filed a return *singly* [Ex. E], . . .” (Italics added.)

It is clear in any case that the return was a single return. The election to file a joint return cannot be made by one spouse alone. Section 51(b) of the Revenue Act of 1938, as quoted by respondent (Br. 85), provides that the income of a husband and wife living together “may be included in a single return made by *them* jointly.” (Italics added.) Obviously the election must be made by both and not by one. Rose’s 1938 return, however, was made solely by him. [R. 429, Ex. E.] Besides, since his wife filed no return for that year (Br. 48), the Commissioner may still pursue her in respect to taxes for that year. (Revenue Act of 1938, Section 276(a).)

As to 1938, the only individual taxpayer involved here is A. Brigham Rose and since his professional income for that year was community income, only one-half thereof belonged to him. (*U. S. v. Malcolm*, 282 U. S. 792.) It follows necessarily that only one-half thereof is includible in his gross income for that year.

VI.

Clear Evidence Shows the Time Rose Acquired the Silver King Coalition Mines Stock as 1936, and Its Basis, the Value When Acquired, as \$8 Per Share, or \$9,600.

Under Point VI, pages 48-54, of his brief, respondent covers the subject of the Silver King Coalition stock, a subject covered by petitioners under Point IX of their brief, pages 35-36.

Respondent's principal contention under this heading is that Rose did not acquire the stock in 1936, but in 1934. Respondent concedes, however, that what Rose acquired in 1934 was not the stock itself, but "the right to it." (Br. 23, 50.) It would follow from that fact that the stock was acquired by him in 1934 if he were on the accrual basis. (*Spring City Foundry Co. v. Commissioner*, 292 U. S. 182.) But Rose was on a cash basis. [R. 428.] Under that method actual receipt is the determining factor. (*Avery v. Commissioner*, 292 U. S. 210.) As respondent concedes the stock was not actually received by Rose until 1936. (Br. 50.) It necessarily follows that for tax purposes this stock was acquired by him in 1936.

The evidence is clear that at that time the stock was worth \$8.00 per share. In quoting from Rose's testimony on this point (Br. 52), respondent omits Rose's final sentence. In respect to what the stock was worth in 1936, that sentence was as follows: "I knew what it sold for." [R. 348, beginning in the seventh line from the bottom.] Rose, therefore, did not just guess at the \$8.00 a share; he knew that that was the price for which the stock sold in 1936.

This was the only evidence before the court as to what the stock was worth in 1936. Certainly it was substantial evidence and the Tax Court should have used it. The record is clear that the \$4,500.00 figure used by the Commissioner was only the amount of a loan which Rose made against the stock as security in 1947. [R. 298-299.]

And if the stock should be regarded as having been acquired by Rose in 1934, what is the result? The evidence shows that in 1934 an inheritance tax return was filed in which the stock was valued at \$10.00 per share. Referring to that return Rose testified—"I filed that." [R. 348.] This \$10.00 valuation was clearly then no hearsay. This was the witness' own determination in 1934. The effect is the same precisely as if he had used that determination merely to refresh his memory. If 1934 was the time when the stock was acquired by him the basis should be \$10.00 per share and the loss which he deducted should therefore have been increased by the Commissioner in the amount of \$2,400.00, and not reduced by him in the amount of \$5,100.00, as he did,

VII.

Recorded Encumbrances on the Villa Courts Are Evidence of Their Basis, and Depreciation Should Have Been Allowed Thereon.

Under Point VII of his brief, pages 54-57, respondent covers the subject of depreciation, a subject covered by petitioners under Point X, page 37, of their brief.

Respondent correctly observes that some depreciation was allowed to the individual petitioners by the Commissioner. (Br. 55.) Although the Commissioner made no allowance of depreciation to Lori, he did make an allowance of depreciation to the individual petitioners, at least for the years 1940 and 1941. The amount allowed in each of those years was \$168.00. [R. 14, 529.] It may be also that the same amount was allowed for 1939. While the deficiency notice shows an adjustment decreasing the loss from rentals for that year [R. 527-528], the detail of the adjustment is not shown. In any event, petitioners apologize for having failed to note that some allowance was made to the individual petitioners.

As to Lori, respondent's only contention is that there was no evidence of basis. The very clear answer to that contention is that there was good evidence of the basis, as this Court will observe.

Respondent states that Lori has submitted no "acceptable evidence that it owned depreciable assets having a cost value of \$32,000,¹⁴ as claimed in its 1940 and 1941 returns." (Br. 55-56.) Footnote 14 referred to in the quoted wording says:

"Taxpayer Rose's statement to the Tax Court that Lori's Villa Courts property, acquired by others in 1930, had 'record' 'encumbrances in the amount of \$38,000.00, augmented by the * * * substantial trust

funds of the Mary Allen trust (which) went into this property' [Tr. 22, p. 37], of course, can have no significance in respect of the depreciable bases of the property for the taxable years involved here."

The Tax Court in its findings takes note of the record encumbrances referred to. [R. 433.] Those record encumbrances are a part of the cost of the property, *Crane v. Commissioner*, 331 U. S. 1, 67 S. Ct. 1047. Clearly then the Tax Court did have a basis on which to compute depreciation on the Villa Courts. Based on the authorities cited in petitioners' opening brief on this point, the Tax Court should have made an allowance for depreciation on the Villa Courts.

VIII.

Lori Has No Taxable Income of Its Own Since, as Respondent States, Rose Is the Beneficial Owner and Income Is Taxed to the Beneficial Owner of Property.

We come now to the issue as to whether Lori had any income of its own at all. This issue is covered by respondent in point VIII, pages 57-61, of his brief and by petitioners in point III, pages 22-24, of their opening brief. Any discussion elsewhere in this brief involving the taxes imposed on Lori is necessarily subject to this issue.

First, we should like to correct a clear misstatement. Referring to rents collected from the Villa Courts respondent says:

"This was in excess of \$16,240 alone for 1939 [R. 72-73], and it [Lori] had gross income around \$25,000 a year [R. 72], as the taxpayers state (Br. 23)." (Br. 59.)

Petitioners made no such statement, either on page 23 of their brief, or anywhere else.

As a main pillar for its conclusions respondent thereafter says:

“It [Lori] realized taxable net income from its operations in the respective sums of \$9,488.13, \$8,-167.24, \$11,965.17 and \$9,239.52, as redetermined by the Tax Court, for the taxable years 1938 to 1941, inclusive. [Tr. 61.]” (Br. 59.)

Of course, this is begging the question. The issue here is whether Lori had any taxable net income at all.

Petitioners do not contend that Lori was not a corporate entity. They contend only that it had no income of its own, that the money and property which appeared in its name did not belong to it, but to Rose.

Respondent himself, attempting to straddle between Lori as owner and Rose as owner, senses his precariousness. In his point I, wherein he attempts to sustain the *prima facie* correctness of his deficiency determinations, he observes that “ownership of the income” is determinative of its taxability; and that as to “the ownership of the income in question, it will be noted that one outstanding fact implicit in the entire record is that substantially all the income of Lori, Brevoort and the other corporate enterprises herein inured to taxpayer Rose’s benefit individually, not only during the four taxable years but also thereafter.” (Br. 28.) Thereupon respondent rests the *prima facie* correctness of his determination that income “of” Lori, which he taxes to Lori, is “owned” by Rose and therefore taxable to Rose.

Again, in his point IV, dealing with the inclusion in Rose’s gross income of the value of Rose’s use of a part of the Villa Courts, respondent concedes that Rose had

an equity in the property, but uses quotes around the word “equity” (Br. 22, 45), as if that might in some manner cancel out a part of its meaning or tone down its significance. In fact, he goes so far as to refer to it as “*merely an ‘equity.’*” (Br. 45. Italics added.)

Since there were encumbrances against the property [Br. 56, footnote; R. 433], what else but an equity could Rose *as owner* have had in it? Clearly the Tax Court was not exaggerating in the slightest Rose’s interest in the Villa Courts when it found that those courts “*were beneficially owned by Rose*, subject to the encumbrances against them and the unliquidated claim of Mary Woods *against Rose*”; and that by his expenditures on behalf of Lori, Rose “sought to and did thereby protect and preserve his” equity in the property. [R. 433, 441. Italics supplied.]

Outside of the Villa Courts, the only property which the record shows in Lori’s name was a bank account. As to the bank account the result is the same as in the case of the Villa Courts. That account, as the Tax Court found, was used by Rose for his “personal deposits and expenditures.” [R. 431.] No funds remained in that account. What came in was paid out. [R. 445.] It was a mere conduit.

Respondent, in his direct consideration of this issue, quotes from the opinion of the Supreme Court in the *Moline Properties* case. (Br. 59.) But the corporation there, as respondent’s quotation shows, “engaged in an unambiguous business venture *of its own.*” (Italics added.) Here the corporation involved had *no* activities of its own. It was organized merely to “*hold title* to the courts—the bungalows, and villas”—this according to respondent’s own witness. [R. 56, italics added.] The

Tax Court implies the same when it shows that Lori's only "activities" were that it "did engage in the business of *holding* real estate." [R. 428, italics added.]

Indeed, as respondent observes, a loan of \$7,000 was made in Lori's name from a bank in 1938. (Br. 58.) But Rose and his wife were joint payors with Lori on the note [R. 127]; and the loan was a part of a series of loans which Rose made for his own personal requirements because of the deficiency in his income. [R. 125-127.] While furthermore, the money was deposited in the Lori account, that account, as observed above, was used by Rose for his "personal deposits and expenditures." [R. 431.] Respondent points to no evidence showing that Lori engaged in any venture for its own purposes as distinguished from those of Mr. Rose. The *Moline* case is therefore wholly inapplicable.

The Court in the *Moline* case, moreover, contrary to the effort of the respondent here, does not straddle between the corporation and the stockholder. There the Court stated, 319 U. S. at page 438:

"The question is whether the gain realized on the 1935 and 1936 sales shall be treated as income taxable to petitioner, as the Government urges, *or* as Thompson's income." (Italics added.)

Here the respondent treats the income as Lori's in the computation of Lori's taxes, and as the income of Rose in the computation of Rose's taxes. It is not without purpose that he speaks of the income "of" Lori as being "owned" by Rose. (Br. 28.)

Respondent is correct when he says that Lori "is chargeable with its own income." (Br. 60.) But that begs the real question here, as to whether the income

received from the Villa Courts or merely passing through the bank account carried in the name of Lori was owned by Lori or by Rose. Rose was the owner of the income here; Lori was a mere agent, nominee, or title holder.

As the *Wilcox* and *Griffiths* cases cited in petitioners' opening brief, page 24, show, this problem must be dealt with realistically. Under the circumstances here we submit again, the income, if any, received in the name of Lori should be taxed to Rose and not Lori.

IX.

The Record Clearly Shows That Rose Paid Expenses of Lori From Monies Received by Him From Lori; and Respondent's Answer That Petitioners Have Failed to Segregate the Expenses as Between the Villa Courts and Brevoort's Hotel Is No Answer Since Income From Both Sources Was Taxed to Lori, Also Without Segregation.

Under point IX, pages 61-66 of his brief, respondent covers the business expenses of Lori paid by Rose in 1938 and 1939, a subject covered by petitioners under point IV of their brief, pages 25-27.

Respondent's contention is mainly that petitioners failed to segregate the amounts involved as between expenses paid on account of the Villa Courts and those paid on account of Brevoort's hotel. (Br. 62, 63, 65.) This contention, however, must fall before the fact that the receipts included in Lori's gross income included receipts from both the Villa Courts and the hotel. Respondent himself observes this fact. (Br. 64, 66.) While the Tax Court did make an allowance to Lori for hotel receipts in 1940 and 1941 [R. 447], it made no such allowance for 1939. As to 1938 it made an aggregate allowance

of \$9295.00 covering both “expenses of operation and to adjust gross receipts reflecting both Villa and hotel operations.” [R. 447.] But the record does not show that any part of this amount represents an exclusion from Lori income of hotel receipts. [R. 293-296, Exs. 94 and 95.]

The record is clear, on the other hand, that Lori deposits included both Villa Court and hotel receipts and that the expenditures involved here were made by Rose out of the funds received by him from Lori. Since the hotel receipts were included in the Lori gross income there does not appear to be any reason why it is necessary to make any segregation as between the expenses of the hotel and the expenses of the Villa Courts operations in allowing deductions to Lori.* Lori received their receipts and paid their expenses although the payments were made through the bank account of Rose. [R. 441.] It necessarily follows that the payments made by Lori to Rose or for his account during the years 1938 and 1939 and used by Rose for hotel and Villa Court expenses are proper deductions to Lori. The amounts are \$10,748.62 for 1938 and \$6,107.21 for 1939. [R. 441.]

Respondent suggests the possibility that these expenses should not be allowed as deductions to Lori but rather included as income to it, being expenses paid by Rose

*The respondent is in clear error in stating that the amount of \$508.65 shown in petitioners' opening brief, page 25, is “the identical amount shown as paid by taxpayer Rose on behalf of *Brevoort* for that year [Ex. GG].” (Br. 64.) The exhibit cited clearly shows that that amount was paid on behalf of the Villa Court operations and not Brevoort.

for Lori's benefit. (Br. 66.) Of course, if the amounts paid by Rose on Lori's behalf were treated as constructively received by Lori they would have to, by the same token, be treated as constructively paid by Lori. However, these expenses were not paid by Rose out of his own money but, as the record clearly shows, out of monies received by him from Lori. [R. 441.]

X.

There Should Be Excluded From Lori's Income the Eleven Specific Non-income Items Identified in the Record and Set Out Under Point V of Petitioners' Opening Brief, Not a One of Which Items Is Specifically Challenged in Respondent's Brief.

The issue here involves (a) monies borrowed by Rose as an individual and deposited in the Lori account (\$3,500.00, \$1,456.76, and \$3,200.00 for the years 1939, 1940, and 1941, respectively), and (b) monies transferred from the Rose accounts to the Lori account not representing rentals allocable to the Villa Courts (\$1,075.00, \$1,500.00, and \$1,380.00 for the years 1939, 1940 and 1941, respectively). This issue is covered by respondent under point X, pages 66-70, of his brief, and by petitioners under point V, pages 27-30, of their opening brief.

Petitioners' opening brief shows 11 separate items under this heading and identifies each one specifically in the record. Respondent has failed to challenge a single one of them. In regard to these items petitioners rest upon the statements made in their opening brief.

XI.

Lori Is Entitled to an Excess Profits Credit Since That Issue Was Timely Raised Before the Court Below and Involves Strictly a Matter of Computation.

This issue involves the question whether Lori is entitled to an excess profits credit in the determination of its excess profits tax liability for any of the taxable years involved. This question is covered by respondent under point XI, pages 70-75, of his brief, and by petitioners under point VI, pages 31-33, of their brief.

In the course of his statement under this issue, respondent points out that a case cited by petitioners, *Zimmermann v. Commissioner*, 36 B. T. A. 618, was reversed and remanded on appeal. While petitioners should have noted the fact that the said case was reversed and remanded, the action of the Court of Appeals therein had no connection with the point on which the opinion of the Board of Tax Appeals [now the Tax Court] in that case was cited. The reversal and remand resulted entirely from the intervening decision of the Supreme Court in *United States v. Pleasants*, 305 U. S. 357, on the question whether the losses involved were deductible in arriving at the base for the allowance for contributions. The reversal and remand had no connection with the problem of computation where a mere mathematical adjustment is involved. The point made by the Board in that case has more recently been made by the Tax Court in another case, *Stern Bros. & Co. v. Commissioner*, 16 T. C. No. 40, decided February 8, 1951.

Respondent contends under this heading also that the issue was raised here for the first time. As in the case of the problem of Mrs. Rose's half interest in Mr. Rose's 1938 professional earnings, considered under point V

above, this issue was also presented to the Tax Court in its second motion for rehearing June 8, 1949. As there pointed out, the said motion of petitioners was supported by a detail under the heading of Objections to Respondent's Computations under Rule 50. While the said objections were filed as a part of the motion, the motion was, nevertheless, a motion for rehearing. In the third paragraph of those objections petitioners expressly raised this issue.*

On the merits of this problem respondent's only contention is that there was a lack of proof. Petitioners submit again, as they did in their opening brief, that on the basis of the information contained in the record, this is strictly a question of mathematics and that the computation could and should have been made.

XII.

Petitioners Cannot Be Guilty of Fraud When Errors in the Commissioner's and the Tax Court's Computations Show the Correct Taxable Income to Be Very Close to What the Taxpayers Reported and Where There Was No Intent to Evade Taxes.

This is the fraud issue covered by respondent under point XII, pages 75-84 of his brief, and by petitioners under point XII, pages 40-44 of their opening brief.

Respondent contends here that according to petitioners' opening brief, page 20, petitioners had understated their true income by more than \$80,000.00 for the years involved. (Br. 79.) That amount is, indeed, the difference between the net income of the individual petitioners' tax

*Reference to this document is allowed under the order permitting reference to documents without printing. [R. 566.]

returns and their net income as determined by the Commissioner. It is substantially upon this difference in amount that respondent bases the charge of fraud. The Tax Court itself, however, found that the Commissioner was high by almost \$40,000.00. And the difference remaining of \$40,000.00 between the Tax Court's results and the petitioners' returns is, as we have already shown, in direct conflict with the Commissioner's own evidence, Exhibit S, which is the only evidence relating to the net worth basis upon which he says the Commissioner made his redeterminations.

Regardless of what the correct net income may be, furthermore, there is no evidence whatever in the record of an intent on the part of these petitioners to evade tax. Upon the record petitioners submit again that a charge of fraud is impossible.

Conclusion.

Petitioners contend, in conclusion, that respondent has wholly failed to meet the issues raised by petitioners; and they submit again that the decisions of the Tax Court should be reversed, with remand, if this Court deems necessary, in respect to any factual issues which must be resolved.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioners.

No. 12539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD.,
INCORPORATED: ZELLETTA M. ROSE and A. BRIGHAM
ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

GEORGE T. ALTMAN,
327 General Petroleum Building,
Los Angeles 17, California,
Attorney for Petitioners.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Belridge Oil Co. v. Commissioner, 85 F. 2d 762.....	4
Commissioner v. Buck, 120 F. 2d 775.....	2
Midwood Associates, Inc. v. Commissioner, 115 F. 2d 871.....	2
Thornley et al. v. Commissioner, 147 F. 2d 416.....	2
TEXTBOOKS	
Jones on Evidence (4th Ed.), Sec. 236.....	3

No. 12539

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD.,
INCORPORATED: ZELLETTA M. ROSE and A. BRIGHAM
ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

This cause was heard by this Court on April 11, 1951. A *per curiam* decision was rendered on April 12, 1951.

The opinion states only (1) that the "matters raised by the brief and upon the oral argument present nothing but questions of fact," and (2) that the Court's examination of the record convinces it that "the findings of the Tax Court, including the findings of fraud and negligence, are supported by the evidence."

As even respondent's brief shows, however, the primary questions presented were questions of law. Thus, the question whether, under the facts as found by the Tax Court, the *prima facie* correctness of the Commissioner's determinations had been overcome, is purely a question of law. Again, the question whether, under the facts as found by the Tax Court, Rose was taxable on all or one-

half of the community income, is distinctly a question of law. Likewise, the question whether, under the fact found by the Tax Court that Rose was the beneficial owner of the Villa Courts, the income therefrom was taxable to Lori or to Rose, is solely a question of law. Further, the question whether, under the facts as found by the Tax Court, Lori was entitled to allowance of an excess profits credit, is strictly a question of law.

The same is true of the question raised in respect to Rose's financial statements. The asset, net worth, and income figures in those statements were elaborately set out by the Tax Court in its findings [R. 444]; and upon those figures that Court expressly and heavily relied [R. 450-451]. The question whether those figures should, because Rose was on a cash basis, have been adjusted by the elimination of accounts receivable and payable, shown on the face of the statements, is purely a question of law.

That question is one involving the interpretation of documentary evidence, and as such is a question of law and not a question of fact.

Midwood Associates, Inc. v. Commissioner, 115 F. 2d 871 (C. A. 2, 1940);

Commissioner v. Buck, 120 F. 2d 775 (C. A. 2, 1941);

Thornley et al. v. Commissioner, 147 F. 2d 416 (C. A. 3, 1945).

Such elimination of accounts receivable and payable would have reduced the Tax Court's figure for increase in net worth by \$44,000 [R. 560], which is more than the entire difference between the aggregate net income per returns, \$37,706.21, and the aggregate net income per Tax Court redetermination, \$79,540.06 [R.555].

The effect of this error of the Tax Court was to subject Rose to tax twice on the same \$44,000, first in the years in which accrued, and again in the years in which collected. Moreover, it was primarily upon these financial statements that the Tax Court's finding of fraud was based. [R. 450-451.]

These financial statements of petitioner Rose, it may also be observed, were introduced into evidence, not by petitioners, but by respondent, and without any limitation as to the purpose of their introduction. [R. 89-91.] In oral argument, nevertheless, this Court suggested to respondent's counsel that these financial statements could be disregarded as self-serving declarations, and that they were not binding on respondent. Those issues, too, are clearly issues of law, not of fact. Nor was the Court's statement of the law correct. In Jones on Evidence, Fourth Edition, §236, it is stated, citing numerous cases:

"The objections which have been pointed out above do not hold against the reception of statements of a party where the statements are offered by his adversary.

* * * * *

"They are, it is true, declarations made out of court and without the sanction of an oath, yet they are statements, not of third persons, but of a party to the litigation; and, where they are offered against him, it is only fair to presume, until the contrary is shown, that they are correct."

Also, in oral argument, the Court raised the question whether the issue as to the Tax Court's error in interpreting these financial statements was timely raised, since it was first raised below after opinion, on a motion for

rehearing. This also is no question of fact, but only one of law.

Disregarding these financial statements, the Tax Court's redetermination was based solely on negative evidence. This negative evidence consists of "unidentified bank deposits" [R. 436], most of which deposits, in fact, the taxpayers clearly identified as non-income deposits. In direct conflict with this meager negative evidence were the financial statements, which are positive evidence of what they show. (See the numerous cases cited by respondent in his brief, pages 31-33, in which, as respondent there observes, redeterminations of net income were sustained on the basis of increases in net worth.) The Tax Court was not aware of this conflict in the evidence before it, because of its misinterpretation of the financial statements. The net result is the same as if the Tax Court had refused to admit certain positive admissible evidence and had based its decision solely on meager negative evidence in conflict therewith.

We submit that it was the duty of this Court to remand this case to the Tax Court so that it might assign weight and consideration to the positive evidence thus in effect excluded by the Tax Court. This Court did just that in *Belridge Oil Co. v. Commissioner*, 85 F. 2d 762 (C. A. 9, 1936).

WHEREFORE, petitioners petition this Court for a rehearing in this proceeding.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

Certificate of Counsel.

Counsel in this proceeding certifies that in his judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

GEORGE T. ALTMAN.

No. 12540

United States
Court of Appeals

for the Ninth Circuit

see note 2641
JACUZZI BROS., INCORPORATED, a Corpora-
tion,

Appellant,

vs.

BERKELEY PUMP COMPANY, a Corporation,
BERKELEY PUMP COMPANY, a Partner-
ship, and FRED A. CARPENTER, LANA L.
CARPENTER, F. F. STADELHOFFER,
ESTELLE E. STADELHOFFER, JACK L.
CHAMBERS, WYNNIE T. CHAMBERS,
CLEMENS W. LAUFENBERG and MARIE
C. LAUFENBERG, Partners Associated in
Business Under the Fictitious Name and Style
of Berkeley Pump Company,

Appellees.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 493)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

SEP 6 - 1950

No. 12540

United States
Court of Appeals
for the Ninth Circuit.

JACUZZI BROS., INCORPORATED, a Corporation,
tion,

Appellant,

vs.

BERKELEY PUMP COMPANY, a Corporation,
BERKELEY PUMP COMPANY, a Partnership, and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFFER, ESTELLE E. STADELHOFFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, Partners Associated in Business Under the Fictitious Name and Style of Berkeley Pump Company,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 493)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint and Counterclaim for Declaratory Relief and Injunction.....	12
Answer to Counterclaim.....	32
Appeal:	
Appellant's Statement of Points on.....	489
Certificate of Clerk to Record on.....	486
Designation of All of the Record Material to the Consideration of the.....	492
Designation of Contents of Record on....	98
Notice of	97
Appellant's Statement of Points on Appeal..	489
Certificate of Clerk to Record on Appeal.....	486
Complaint	2
Defendants' Answer to Plaintiff's Oral Inter- rogatory	35
Defendants' and Counterclaimant's Proposed Findings of Fact and Conclusions of Law..	76
Designation of All of the Record Material to the Consideration of the Appeal Herein....	492

INDEX	PAGE
Designation of Contents of Record on Appeal.	98
Judgment	94
Memorandum Decision	56
Names and Addresses of Attorneys.....	1
Notice of Appeal	97
Order Amending Findings of Fact and Conclusions of Law	99
Plaintiff's Interrogatories and Answers to Plaintiff's Interrogatories	37
Reporter's Transcript	101
Stipulation Re Defendants' Pumps and Pump Systems	55
Witnesses, Defendants':	
Carpenter, Fred A.	
—direct	245, 345
—cross	358, 376
—redirect	386
Folsom, Richard Gilman	
—direct	269, 315
—cross	338
Layne, William Robert	
—direct	395
—cross	402

INDEX

PAGE

Witnesses, Plaintiff's:

Armstrong, John E.

—direct	202, 412, 454
—cross	218, 469
—redirect	241, 243, 479
—recross	241

Granberg, Albert J.

—direct	425
—cross	436
—redirect	453

Jacuzzi, Candido

—direct	103, 150
—cross	151, 200
—redirect	201

Exhibits, Plaintiff's:

No. 1—Patent No. 2,424,285	497
2—Patent No. 2,344,958	504
12—Berkeley Bulletin 501.....	510
13—Berkeley Bulletin 503, Second Edition	514
14—Berkeley Bulletin 506 of July 25, 1947	518
19—Carpenter Patent No. 2,280,626...	526

	INDEX	PAGE
Exhibits, Plaintiff's—(Continued):		
No. 20—Page six “Jacuzzi Double Discharge Pump” of Jacuzzi Bulletin (King Pump)		530
22—Berkeley Catalog Re Fire Fighting Pumps		531
Exhibits, Defendants':		
A—Drawing of Pump Unit and Injector Assembly		535
E—Rhoda Letters Patent Only as Shown in File Wrapper of Rhoda Patent No. 2,315,656		536
F—All Pages of Berkeley Installation and Operating Instructions		542
J—Chart of Pump Structure Manufactured by Berkeley.....		544
M—Veronesi (Italian) Patent No. 139,161 (1913)		545
N—Veronesi (Italian) Patent No. 260,417 (1927)		552
O—Sulzer Patent No. 704,144.....		561
P—Rateau Patent No. 730,842.....		564
Q—Stepanoff Patent No. 2,248,312.....		569
R—Ensslin Patent No. 1,494,595.....		575

INDEX

PAGE

Exhibits, Defendants'—(Continued):

S—Jacuzzi Patent No. 1,758,400.....	579
T—Jacuzzi Patent No. 2,150,799.....	584
U—Speck (German) Patent No. 376,684..	591
V—Schmid (British) Patent No. 382,592.	595
W—Drawing No. VA 9223, Signal Oil Pump	599
X—Drawing in Booklet, “Looking For- ward”	600
M-1—Translation of Veronesi Patent (Exh. M)	601
N-1—Translation of Veronesi Patent (Exh. N)	605
U-1—Translation of Speck Patent (Exh. U)	609
AJ-1—All of Jacuzzi Bulletin B.....	615
AJ-5—Hilliard Patent No. 1,059,994.....	618
AJ-6—Enlarged Drawing From Italian Patent No. 260,417.....	621

NAMES AND ADDRESSES OF ATTORNEYS

CHARLES O. BRUCE,

NATHAN G. GRAY,

1206 American Trust Building,
Berkeley, California.

Attorneys for Plaintiff and Appellant.

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

391 Sutter Street,
San Francisco, California.

Attorneys for Defendants and Appellees.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27905G

JACUZZI BROS, INCORPORATED, a Corpora-
tion,

Plaintiff,

vs.

BERKELEY PUMP COMPANY, a Corporation,
BERKELEY PUMP COMPANY, a Partner-
ship, and FRED A. CARPENTER, LANA
L. CARPENTER, F. F. STADELHOFFER,
ESTELLE E. STADLEHOFFER, JACK L.
CHAMBERS, WYNNIE T. CHAMBERS,
CLEMENS W. LAUFENBERG and MARIE
C. LAUFENBERG, Partners, Associated in
Business under the Fictitious Name and Style
of BERKELEY PUMP COMPANY,

Defendants.

FOR INFRINGEMENT OF UNITED STATES
LETTERS PATENT Nos. 2,344,958 AND
2,424,285

COMPLAINT

Comes now the plaintiff above-named and, com-
plaining of the defendant above-named, for claims
for relief, alleges:

A. For a First Claim for Relief

I.

That at all times herein mentioned, plaintiff, Jacuzzi Bros., Incorporated, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City of Richmond, County of Contra Costa, in said State;

II.

That at all times herein mentioned, defendant, Berkeley Pump Company, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City of Berkeley, County of Alameda, in said State;

III.

That at all times herein mentioned, defendant, Berkeley Pump Company, a partnership, was and now is a partnership composed of two or more persons associated in the business of manufacturing and selling pumps and pump systems, and doing business under the fictitious name and style of Berkeley Pump Company, at the City of Berkeley, County of Alameda, State of California;

IV.

That at all times herein mentioned, defendants, Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnie T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, were and now are partners under the name of Berkeley Pump Company, at the City of Berkeley, County of Alameda, State of California, and, as such, engaged in the business of manufacturing and selling pumps and pump systems, and are residents of the County of Alameda, State of California;

V.

That heretofore, to wit: prior to July 15, 1941, John E. Armstrong and Jack E. Piccardo were the original, first and joint inventors of a new and useful invention entitled "Pumping System" and on said last named date filed in the Patent Office of the United States an application for letters patent on said invention;

VI.

That concurrently with the execution of said application, the said John E. Armstrong and Jack E. Piccardo duly executed and delivered to plaintiff, Jacuzzi Bros. Incorporated, a corporation, an assignment in writing of the entire right, title and interest in and to said invention and the application for letters patent thereon and said letters patent, when and if granted, and did request in said

assignment that said letters patent, when and if granted should be issued to said plaintiff, Jacuzzi Bros., Incorporated, a corporation; that said assignment was duly recorded in the United States Patent Office on the 15th day of July, 1941, in Liber K-188, Page 636;

VII.

That thereafter, to wit: on March 28, 1944, after proceedings duly and regularly had and taken in respect to said application, letters patent on said invention, numbered 2,344,958, were duly and legally granted, issued and delivered by the Government of the United States of America to said Jacuzzi Bros., Incorporated, a corporation, whereby there was granted to said Jacuzzi Bros., Incorporated, a corporation, its successors and assigns, for the term of seventeen years from and after March 28, 1944, the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof; that a more particular description of said invention patented in and by said letters patent will more fully appear from said letters patent themselves which are ready in Court to be produced by plaintiff;

VIII.

That plaintiff is now, and ever since March 28, 1944, has been the sole owner of the entire right, title and interest in and to said letters patent No. 2,344,958, together with all causes of action for infringement thereof, wherever and by whomsoever

committed, and all profits and damages arising out of such infringement;

IX.

That plaintiff is informed and believes and upon such information and belief alleges that within six years last past and prior to the commencement of this suit and within the Southern Division of the Northern District of California and elsewhere in the United States of America, defendants, Berkeley Pump Company, a corporation, Berkeley Pump Company, a partnership, and Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnie T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, partners, associated in business under the fictitious name and style of Berkeley Pump Company, have been and still are jointly and severally, directly and/or contributorily, and in conspiracy, infringing said Letters Patent No. 2,344,958, by making, using and selling, and contributing to the making, using and selling of pumps and pumping systems embodying and containing the invention disclosed in and by said letters patent; and that unless enjoined by this Court, said defendants will continue to so infringe said letters patent;

X.

That plaintiff has placed the required statutory notice on all pumps and pump systems manufactured and sold by and for it under said letters

patent, and has given written notice to said defendants of their said infringement;

XI.

That by reason of defendants' said infringement, plaintiff has suffered damages, and defendants have jointly and severally realized gains, profits and advantages, but the exact amount of such damages and/or profits is unknown to plaintiff and can be ascertained only by an accounting;

Wherefore, plaintiff prays judgment etc.

B. For a Second Claim for Relief

I.

Plaintiff repeats and re-alleges, as part of this Second Claim for Relief, each and all of the allegations contained in Paragraphs I, II, III and IV of the First Claim for Relief, and with like effect as if herein fully re-alleged, and incorporates herein all the facts therein set forth;

II.

That heretofore, to wit: prior to May 31, 1941, Jack E. Piccardo and John E. Armstrong were the original, first and joint inventors of a new and useful invention entitled "Pump and Pump System" and on said last named date filed in the Patent Office of the United States an application for letters patent on said invention;

III.

That concurrently with the execution of said application, the said Jack E. Piccardo and John E. Armstrong duly executed and delivered to plaintiff, Jacuzzi Bros., Incorporated, a corporation, an assignment in writing of the entire right, title and interest in and to said invention and the application for letters patent thereon and said letters patent when and if granted, and did request in said assignment that said letters patent, when and if granted, should be issued to plaintiff, Jacuzzi Bros., Incorporated, a corporation; that said assignment was duly recorded in the United States Patent Office on the 31st day of May, 1941, in Liber Y-187, Page 532;

IV.

That thereafter, to wit: on July 22, 1947, after proceedings duly and regularly had and taken in respect to said application, letters patent on said invention, numbered 2,424,285, were duly and legally granted, issued and delivered by the Government of the United States of America to said Jacuzzi Bros., Incorporated, a corporation, whereby there was granted to said Jacuzzi Bros., Incorporated, a corporation, its successors and assigns, for the term of seventeen years from and after July 22, 1947, the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof; that a more particular description of said invention patented in and by said letters patent will more fully appear from said let-

ters patent themselves which are ready in Court to be produced by plaintiff;

V.

That plaintiff is now, and ever since July 22, 1947, has been the sole owner of the entire right, title and interest in and to said letters patent No. 2,424,285, together with all causes of action for infringement thereof, wherever and by whomsoever committed, and all profits and damages arising out of such infringement;

VI.

That plaintiff is informed and believes and upon such information and belief alleges that within six years last past and prior to the commencement of this suit and within the Southern Division of the Northern District of California and elsewhere in the United States of America, defendants, Berkeley Pump Company, a corporation, Berkeley Pump Company, a partnership, and Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnne T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, partners, associated in business under the fictitious name and style of Berkeley Pump Company, have been and still are jointly and severally, directly and/or contributorily, and in conspiracy, infringing said Letters Patent No. 2,424,285, by making, using and selling, and contributing to the making, using and selling of pumps and pumping systems embodying and containing the invention dis-

closed in and by said letters patent; and that unless enjoined by this Court, said defendants will continue to so infringe said letters patent;

VII.

That plaintiff has placed the required statutory notice on all pumps and pump systems manufactured and sold by and for it under said letters patent, and has given written notice to said defendants of their said infringement;

VIII.

That by reason of defendants' said infringement, plaintiff has suffered damages, and defendants have jointly and severally realized gains, profits and advantages, but the exact amount of such damages and/or profits is unknown to plaintiff and can be ascertained only by an accounting;

Wherefore, plaintiff prays judgment:

(a) That said Letters Patent Nos. 2,344,958 and 2,424,285, and each of them, be adjudged valid and that the same have been infringed by said defendants;

(b) That defendants, and each of them, their officers, agents, attorneys, servants, employees, associates and workmen, be enjoined during the pendency of this action and permanently from infringing upon said letters patent, or either of them, and from contributing to or aiding or abetting the infringement of said letters patent, or either of

them, either directly or indirectly, or in any manner whatsoever;

(c) That plaintiff have and recover from defendants all damages which it has sustained and/or all profits realized by defendants, and each of them, by reason of the infringement aforesaid; that said damages be trebled; and that an accounting be decreed for said damages and/or profits;

(d) That plaintiff have and recover from defendants, reasonable attorney fees herein;

(e) That plaintiff be awarded its costs and disbursements in its behalf sustained herein;

(f) That plaintiff have such other and further relief as in equity and good conscience the Court shall deem meet and proper.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 11, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND COUNTER-
CLAIM FOR DECLARATORY RELIEF
AND INJUNCTION

Come now the defendants above named and, for their answer to the complaint heretofore filed, admit, deny and allege as follows:

Answering the Allegations Contained in the Alleged First Claim for Relief of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege as Follows:

I.

Answering Paragraph I of the complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph, and on that ground deny each and every allegation therein contained.

II.

Answering Paragraph II of the complaint, defendants admit the allegations therein contained, and further allege that said Berkeley Pump Company was incorporated on August 1, 1946.

III.

Answering Paragraph III of the complaint, defendants deny that defendant Berkeley Pump Company, a partnership, now is a partnership composed of two or more persons associated in the business

of manufacturing and selling pumps and pump systems, and doing business under the fictitious name and style of Berkeley Pump Company, at the City of Berkeley, County of Alameda, State of California, but on the contrary allege that Berkeley Pump Company, a partnership, was dissolved on or about August 1, 1946.

IV.

Answering Paragraph IV. of the complaint, defendants deny that defendants Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynn timer T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, now are partners under the name of Berkeley Pump Company, at the City of Berkeley, County of Alameda, State of California, and, as such, engaged in the business of manufacturing and selling pumps and pump systems; defendants allege, however, that said defendants were partners under the name of Berkeley Pump Company, at the City of Berkeley, County of Alameda, State of California, up to and about August 1, 1946, and admit that said defendants are residents of the County of Alameda, State of California.

V.

Answering Paragraph V of the complaint, defendants deny that prior to July 15, 1941, or at any other time, John E. Armstrong and Jack E. Piccardo were the original, first and joint inventors, or any inventors of a new and useful invention en-

titled "Pumping System," but admit that on July 15, 1941, the said John E. Armstrong and Jack E. Piccardo did file in the Patent Office of the United States an application for Letters Patent on an alleged invention entitled "Pumping System."

VI.

Answering Paragraph VI of the complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph, and on that ground deny each and every allegation therein contained.

VII.

Answering Paragraph VII of the complaint, defendants admit that on March 28, 1944, Letters Patent of the United States No. 2,344,958 were issued, but except for said admission, defendants deny each and every allegation in said paragraph contained.

VIII.

Answering Paragraph VIII of the complaint, defendants deny each and every allegation therein contained.

IX.

Answering Paragraph IX of the complaint, defendants both generally and specifically deny each and every allegation in said Paragraph IX contained.

X.

Answering Paragraph X of the complaint, defendants admit that plaintiff in writing charged the defendant, Berkeley Pump Company, a corporation, with infringement of said Letters Patent, but except for the matters herein specifically admitted, defendants deny each and every allegation in Paragraph X contained.

XI.

Answering Paragraph XI of the complaint, defendants deny each and every allegation therein contained.

Answering the Allegations Contained in the Alleged Second Claim for Relief of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege as Follows:

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I, II, III and IV of their foregoing answer to the alleged first claim for relief of plaintiff's complaint.

II.

Defendants admit that on or about May 31, 1941, Jack E. Piccardo and John E. Armstrong filed in the United States Patent Office an application for an alleged invention entitled "Pump and Pump

System," but deny that said Jack E. Piccardo and John E. Armstrong were the original, first and joint, or any inventors of a new and useful invention entitled "Pump and Pump System" disclosed in said application for Letters Patent.

III.

Defendants deny each and every allegation in Paragraph III contained of the alleged second claim for relief of plaintiff's complaint.

IV.

Defendants admit that on July 22, 1947, Letters Patent No. 2,424,285 were issued, but except for said admission, defendants deny each and every allegation in said paragraph contained.

V.

Defendants both generally and specifically deny each and every allegation in Paragraph V of the alleged second claim for relief of plaintiff's complaint.

VI.

Defendants both generally and specifically deny each and every allegation in Paragraph VI of the alleged second claim for relief of plaintiff's complaint.

VII.

Defendants admit that plaintiff in writing charged the defendant, Berkeley Pump Company, a corporation, with infringement of said Letters

Patent, but except for the matters herein specifically admitted, defendants deny each and every allegation in Paragraph VII contained.

VIII.

Defendants both generally and specifically deny each and every allegation in Paragraph VIII of the alleged second claim for relief of plaintiff's complaint.

As Further and Separate Defenses Defendants
Allege as Follows:

I.

That defendants are informed and believe and on information and belief allege that said Letters Patent Nos. 2,344,958 and 2,424,285 are invalid in that the things alleged to be described and patented in and by said patents were not inventions and did not require the, or any, exercise of the inventive faculty for their production, and were not patentable, and that, therefore, said alleged patents Nos. 2,344,958 and 2,424,285 are null and void and of no effect.

II.

That defendants are informed and believe and, therefore, on information and belief allege that plaintiff's patents Nos. 2,344,958 and 2,424,285 each and both are invalid because anticipated, in that the alleged invention or inventions attempted to be claimed therein and every material and substan-

tial part thereof is or are disclosed and described in prior Letters Patent of the United States and foreign countries, or in printed publications prior to the alleged invention, inventions, discovery or discoveries of the alleged patentees named in said patents Nos. 2,344,958 and 2,424,285.

III.

That defendants are informed and believe and on information and belief allege that said patents Nos. 2,344,958 and 2,424,285 are invalid in that the things alleged to be described and patented in and by said patents are inoperative.

IV.

That defendants are informed and believe and on information and belief allege that said patents Nos. 2,344,958 and 2,424,285 are invalid in that the things purportedly patented thereby are not distinctly pointed out, described and claimed, as required by the statutes of the United States.

V.

That defendants are informed and believe and on information and belief allege that said patents Nos. 2,344,958 and 2,424,285 are invalid, particularly as to the claims thereof, in that said claims are vague, ambiguous and do not define or distinctly claim the alleged invention, as required by the statutes of the United States.

VI.

That defendants are informed and believe and on information and belief allege that said patents Nos. 2,344,958 and 2,424,285 are null and void and of no effect because of double patenting.

VII.

That defendants are informed and believe and on information and belief allege that the persons named as the inventors in said Letters Patent Nos. 2,344,958 and 2,424,285 are not the first, or any, inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are invalid.

VIII.

That defendants are informed and believe and on information and belief allege that the persons named as joint inventors in said Letters Patent Nos. 2,344,958 and 2,424,285 were, in fact, not the joint, or any, inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are void and invalid.

IX.

That defendants are informed and believe and on information and belief allege that the plaintiff is estopped by the proceedings in the United States Patent Office in the matter of the applications of the applicants for said Letters Patent Nos. 2,344,958 and 2,424,285, and the acquiescence of said applicants in and to the rulings and rejections of the

Commissioner of Patents in the negotiations for said Letters Patent, and in and by the limitations imposed thereby during the negotiations in the United States Patent Office leading up to the grant and issuance of said Letters Patent, from claiming any scope or subject matter of said alleged Letters Patent, or any of the claims thereof, as would comprehend or embrace any apparatus or devices manufactured, sold or used by these defendants.

X.

That defendants are informed and believe and that, therefore, on information and belief allege that they have not committed any act of infringement of said Letters Patent Nos. 2,344,958 and 2,424,285 or any of the claims thereof.

XI.

That defendants are informed and believe and, therefore, on information and belief allege that the pumps, pumping apparatus and pumping systems heretofore manufactured, sold or used by defendants do not infringe said patents Nos. 2,344,958 and 2,424,285 or any of the claims thereof.

COUNTERCLAIM FOR DECLARATORY RELIEF AND INJUNCTION

Comes now the defendant and counter claimant, Berkeley Pump Company, a corporation, and for cause of action for declaratory relief and injunction alleges:

A-I.

That counterclaimant, Berkeley Pump Company, is a corporation duly organized and existing under the laws of the State of California, and has a place of business at Berkeley, County of *Los Angeles*, State of California, and within the Northern District of California, Southern Division.

A-II.

That counterclaimant, Berkeley Pump Company, is informed by the pleadings in this cause of action, and for the purpose of this counterclaim alleges, counter-defendant Jacuzzi Bros. Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business at Richmond, County of Contra Costa, in said State, within the Northern District of California, Southern Division.

A-III.

That the jurisdiction of this Court depends upon the Patent Laws of the United States because this complaint is founded upon the Patent Laws of the United States concerning the validity of Letters patent of the United States, and the question of their infringement by counterclaimant. Jurisdiction is also conferred by Section 274D of the Judicial Code (Federal Declaratory Judgments Act, Title 28, Section 400 U. S. C.)

A-IV.

That it appears from the records of the United States Patent Office that on the 28th day of March, 1944, Letters Patent of the United States No. 2,344,958 were granted and issued to the counter-defendant, Jacuzzi Bros., Incorporated, and that said counter-defendant has been and now is vested with the legal title to said Letters Patent. Defendant-counterclaimant hereby makes profert of a certified copy of said Letters Patent of the United States.

A-V.

That it appears from the records of the United States Patent Office that on the 22nd day of July, 1947, Letters Patent of the United States No. 2,424,285 were granted and issued to the counter-defendant, Jacuzzi Bros., Incorporated, and that said counter-defendant has been and now is vested with the legal title to said Letters Patent. Defendant-counterclaimant hereby makes profert of a certified copy of said Letters Patent of the United States.

A-VI.

That counterclaimant, Berkeley Pump Company, and its direct predecessors in interest have been for many years and now is engaged in the business of designing, manufacturing and selling pumps and pumping systems, and that prior hereto, at great expense, designed and developed pumps and pumping appartaus and pumping systems; that counter-

claimant has heretofore spent large sums of money in producing said pumps, pumping apparatus and pumping systems in commercial quantities and now has a substantial investment therein and intends to continue to manufacture the same in large and constantly increasing quantities and is now so engaged; that counterclaimant has built a large and profitable business in the manufacture and sale of such pumps, pumping systems and pumping apparatus and a valuable good-will in connection therewith, which business is constantly increasing; that counterclaimant further alleges that its ability to continue to manufacture said pumps, pumping systems and pumping apparatus commercially and sell the same is of great importance to counterclaimant and to the trade.

A-VII.

That counter-defendant, Jacuzzi Bros., Incorporated, has at all times held out to the public, and is now so holding out, that said United States Letters Patent Nos. 2,344,958 and 2,424,285 are valid and of a scope of sufficient breadth to include pumps, pumping systems and pumping apparatus such as manufactured and sold commercially by this counterclaimant as aforesaid.

A-VIII.

That due to this holding out of the aforesaid patents to the public as being valid and of a scope sufficient to include pumps, pumping systems and pumping apparatus such as commercially produced

and sold by counterclaimant, counterclaimant is informed and believe and on information and belief alleges that many of its customers and prospective customers will refuse to purchase and use counterclaimant's said pumps, pumping systems and pumping apparatus because of a fear that an action for infringement of the aforesaid patents may be brought against them; that, therefore, the existence of said patents and the holding out thereof as being valid and as of a scope as aforesaid, has been and will continue to constitute a restraint on counterclaimant's business, all to counterclaimant's damage.

A-IX.

That the existence of an opposing claim based upon the aforesaid Letters Patent of the United States against counterclaimant disturbs the peace and freedom of counterclaimant in its business in connection with pumps, pumping systems and pumping apparatus, and places counterclaimant in a position of uncertainty and doubt as to its legal position with respect to said patents, and impairs or jeopardizes its pecuniary interests in its business.

A-X.

Counterclaimant is informed and believes and, therefore, on information and belief alleges that and prospective customers of counterclaimant that incorporated, has been and now is advising customers and prospective customers of counter-claimant that the pumps, pumping systems and pumping apparatus manufactured and sold and offered for sale by

counterclaimant constitutes an infringement of the aforesaid Letters Patent owned by Jacuzzi Bros., Incorporated; and that because of such advising of said customers and prospective customers that they will refuse to purchase and use counterclaimant's pumps, pumping systems and pumping apparatus, all to the damage of counterclaimant's business and its good-will, and counterclaimant is informed and believes and on information and belief alleges that plaintiff-counter-defendant will continue so to do unless restrained by this Court.

A-XI.

Counterclaimant is informed and believes and, therefore, on information and belief alleges that the plaintiff-counter-defendant, Jacuzzi Bros., Incorporated, has and now is advising customers of counterclaimant for counterclaimant's pumps, pumping systems and pumping apparatus, that if such customers or prospective customers purchase and use counterclaimant's pumps, pumping apparatus and pumping systems, they will be liable for infringement of the aforesaid Letters Patent owned by plaintiff-counter-defendant, Jacuzzi Bros., Incorporated, all to the damage of counterclaimant's business and good-will, and counterclaimant is informed and believes and on information and belief alleges that plaintiff-counter-defendant will continue so to do unless restrained by this Court.

A-XII.

Counterclaimant is informed and believes and on information and belief alleges that said plaintiff and counter-defendant, through its agents, salesmen or dealers, will circularize and notify the customers and prospective customers and those interested in purchasing pumps, pumping system and pumping apparatus of a character manufactured and sold by counterclaimant that such pumps, pumping systems and pumping apparatus constitute an infringement of plaintiff-counter-defendant's patents, aforesaid, and that anyone purchasing such pumps, pumping systems and pumping apparatus of counterclaimant will be liable for suit for infringement under the aforesaid patents, all to the damage of counterclaimant's business and good-will, and counterclaimant is informed and believes and on information and belief alleges that plaintiff-counter-defendant will continue so to do unless restrained by this Court.

A-XIII.

Counterclaimant is informed and believes and on information and belief alleges that said Letters Patent Nos. 2,344,958 and 2,424,285 are invalid in that the things alleged to be described and patented in and by said patents were not inventions and did not require the, or any, exercise of the inventive faculty for their production, and were not patentable, and that, therefore, said alleged patents Nos. 2,344,958 and 2,424,285 are null and void and of no effect.

A-XIV.

Counterclaimant is informed and believes and, therefore on information and belief alleges that plaintiff-counter-defendant's patents Nos. 2,344,958 and 2,424,285 each and both are invalid because anticipated, in that the alleged invention or inventions attempted to be claimed therein and every material and substantial part thereof is or are disclosed and described in prior Letters Patent of the United States and foreign countries, or in printed publications prior to the alleged invention, inventions, discovery or discoveries of the alleged patentees named in said patents Nos. 2,344,958 and 2,424,285.

A-XV.

That counterclaimant is informed and believes and on information and belief alleges that said patents Nos. 2,344,958 and 2,424,285 are invalid in that the things alleged to be described and patented in and by said patents are inoperative.

A-XVI.

That counterclaimant is informed and believes and on information and belief alleges that said patents Nos. 2,344,958 and 2,424,285 are invalid in that the things purportedly patented thereby are not distinctly pointed out, described and claimed, as required by the statutes of the United States.

A-XVII.

That counterclaimant is informed and believes and on information and belief alleges that said patents Nos. 2,344,958 and 2,424,285 are invalid, particularly as to the claims thereof, in that said claims are vague, ambiguous and do not define or distinctly claim the alleged invention, as required by the statutes of the United States.

A-XVIII.

That counterclaimant is informed and believes and on information and belief alleges that said patents Nos. 2,344,958 and 2,424,285 are null and void and of no effect because of double patenting.

A-XIX.

That counterclaimant is informed and believes and on information and belief alleges that the persons named as the inventors in said Letters Patent Nos. 2,344,958 and 2,424,285 are not the first, or any, inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are invalid.

A-XX.

That counterclaimant is informed and believes and on information and belief alleges that the persons named as joint inventors in said Letters Patent Nos. 2,344,958 and 2,424,285 were, in fact, not the joint, or any, inventors of the things disclosed in said Letters Patent and that, therefore, said Letters Patent are void and invalid.

A-XXI.

That counterclaimant is informed and believes and on information and belief alleges that the plaintiff? counter-defendant is estopped by the proceedings in the United States Patent Office in the matter of the applications of the applicants for said Letters Patent Nos. 2,344,958 and 2,424,285, and the acquiescence of said applicants in and to the rulings and rejections of the Commissioner of Patents in the negotiations for said Letters Patent, and in and by the limitations imposed thereby during the negotiations in the United States Patent Office leading up to the grant and issuance of said Letters Patent, from claiming any scope or subject matter of said alleged Letters Patent, or any of the claims thereof, as would comprehend or embrace any apparatus or devices manufactured, sold or used by this counterclaimant.

A-XXII.

That counterclaimant is informed and believes and that, therefore, on information and belief alleges that it has not committed any act of infringement of said Letters Patent Nos. 2,344,958 and 2,424,285 or any of the claims thereof.

A-XXIII.

That counterclaimant is informed and believes and, therefore, on information and belief alleges that the pumps, pumping apparatus and pumping systems heretofore manufactured, sold or used by

counterclaimant do not infringe said patents Nos. 2,344,958 and 2,424,285 or any of the claims thereof.

Wherefore Defendants and Defendant-Counterclaimant Pray:

1. For a judgment dismissing the complaint herein.

2. For a declaratory decree declaring each of said Letters Patent Nos. 2,344,958 and 2,424,285, and each of the claims thereof, to be invalid and void in law.

3. For a declaratory decree declaring that said Letters Patent Nos. 2,344,958 and 2,424,285 are not infringed by defendants and defendant-counterclaimant because of the manufacture, sale or use of defendants' and defendant-counterclaimant's pumps, pumping apparatus and pumping systems manufactured, sold and used by defendants and defendant-counterclaimant.

4. For a preliminary injunction enjoining the plaintiff, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, from threatening any of defendant-counterclaimant's customers or dealers, or any present or prospective customers, sellers, dealers or users of defendant-counterclaimant's pumps, pumping systems and pumping apparatus, with infringement litigation because of their buying, selling or using defendant-counterclaimant's pumps, pumping systems or pumping apparatus, or advising or charging any of

such customers, present or prospective, dealers or users, either verbally or in writing, with or notifying them of infringement of Letters Patent Nos. 2,344,958 and 2,424,285 if they should sell or offer for sale or use defendant-counterclaimant's pumps, pumping systems or apparatus, and pending the determination of this suit be restrained or enjoined from commencing in this or in any other Court against any of defendant-counterclaimant's customers, sellers or dealers, or any prospective customers, sellers or dealers of defendants and defendant-counterclaimant, any suit for alleged infringement of Letters Patent here in suit, to-wit, Nos. 2,344,958 and 2,424,285, because of the selling, using or offering for sale of defendants' or defendant-counterclaimant's pumps, pumping apparatus or pumping systems.

5. For a permanent injunction of the same purport and tenor as the preliminary injunction herein prayed for.

6. For a judgment for damages against the plaintiff and in favor of the defendant-counterclaimant in the amount of Twenty-five Thousand Dollars (\$25,000.00) for the wilful and unlawful interference with defendant-counterclaimant's business.

7. That defendants and defendant-counterclaimant be awarded reasonable attorneys' fees in this suit.

8. That defendants and defendant-counterclaimant have their costs and disbursements herein.

9. That defendants and defendant-counterclaim-

ant have such other, further or different relief as the Court may deem appropriate in the premises.

Dated: This 2nd day of March, 1948.

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN.

Attorneys for Defendants and Defendant-Counterclaimant.

Proof of Service attached.

[Endorsed]: Filed March 3, 1948.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes now the plaintiff-counterdefendant in the above entitled action and, for answer to the counterclaim filed herein by defendant-counterclaimant, Berkeley Pump Company, admits, denies and alleges as follows:

I.

Admits the averments contained in Paragraphs A-I, A-II, A-III, A-IV and A-V of said counterclaim;

II.

Answering Paragraph A-VI of said counterclaim, admits that defendant-counterclaimant, Berkeley Pump Company, and its direct predecessors in in-

terest, have been for many years and now is engaged in the business of designing, manufacturing and selling pumps and pumping systems; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other averments of said paragraph and, therefore, denies each and every such other averment;

III.

Answering Paragraph A-VII of said counterclaim, admits that plaintiff-counterdefendant has at all times held out to the public, and is now so holding out, that said United States patents 2,344,958 and 2,424,285 are valid; but denies each and every other averment of said paragraph;

IV.

Answering Paragraphs A-VIII and A-IX of said counterclaim, admits that plaintiff-counterdefendant claims and asserts the existence and validity of its said patents and each of them; denies that it is now making or has ever made any other representations or claims concerning said letters patent or the scope thereof, save only to the defendants in this action and by the mere filing of the original complaint herein; denies that any holding out to the public by plaintiff-counterdefendant of the existence of said letters patent or the validity thereof, or of the mere filing of the original complaint herein, have had any effect upon the business of defendant-counterclaimant or upon its customers or prospective customers, other than the effect of the existence

of said patents and plaintiff-counterdefendant's claim of the validity thereof, and of the filing of the original complaint herein;

V.

Answering Paragraphs A-X, A-XI and A-XII of said counterclaim, denies each and every averment therein contained;

VI.

Answering Paragraphs A-XIII through A-XXIII of said counterclaim, denies each and every averment in said paragraphs contained, and in particular denies each and every said averment with respect to each said patent 2,344,958 and 2,424,285;

Wherefore, plaintiff-counterdefendant prays:

1. For a judgment dismissing the counterclaim herein;

2. For a judgment in accordance with the prayer of plaintiff-counterdefendant's original complaint herein;

3. For such other, further and general relief as the Court may deem appropriate in the premises.

Dated: April 26, 1948.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff-
counterdefendant.

Proof of Service attached.

[Endorsed]: Filed April 27, 1948.

[Title of District Court and Cause.]

DEFENDANTS' ANSWER TO PLAINTIFF'S
ORAL INTERROGATORY

Come now defendants above named, through their attorneys, and state that the following patents are those which defendants, as now advised, will rely upon at the trial of this cause, among other things, to sustain the defenses of invalidity and noninfringement of the above-entitled cause:

United States Patents

Burks	1,856,537	1932
Rateau	1,038,201	1912
Jacuzzi	1,758,400	1930
Anderson	1,771,988	1930
Berman et al.	2,133,269	1938
Carpenter	2,212,010	1940
Fuller	2,303,627	1942
Stuck	1,410,228	1922
Sulzer	704,144	1902
Rateau	730,842	1903
Goeriz	933,247	1909
Alberger	1,009,819	1911
Schneider	1,126,300	1915
Manzel	1,665,670	1928
Skidmore	1,714,735	1929
Crosthwait	1,893,883	1933

Waseige	2,092,565	1937
Bigelow et al.	2,108,786	1938
Spillmann	2,271,352	1942
Stepanoff	2,248,312	1941
Jacuzzi	2,205,121	1940
Jacuzzi	2,150,799	1939
Ensslin	1,494,595	1924
Hilliard	1,059,994	1913
Spencer	893,756	1908
Carpenter	2,280,626	1942
Fuller	2,286,613	1942
Rhoda	2,315,656	1943

Foreign Patents

Speck (German)	376,684	1923
Italian	260,417	1928
German	439,076	1927
British	382,592	1932

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

Attorney for Defendants,

June 3, 1948.

Proof of Service attached.

[Endorsed]: Filed June 4, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES AND
ANSWERS TO PLAINTIFF'S INTER-
ROGATORIES

SECTION A

Comes now the plaintiff, Jacuzzi Bros., Incorporated, a corporation, and pursuant to Rule 33 of the Rules of Civil Procedure, requires the following interrogatories under Section A hereof to be answered by the defendants or an officer of the corporate defendant, having knowledge thereof, and under Section B hereof, by the defendant-counterclaimant, Berkeley Pump Company, a corporation, by an officer thereof having knowledge of the facts.

Plaintiff's Interrogatory No. 1

Did the defendant, or any, or all of them, subsequent to March 28, 1944, and prior to July 22, 1947, and/or subsequent to July 22, 1947, and prior to the commencement of this suit, make, use and/or sell within the Northern District of California, any pump system, or pump structure, substantially the same in construction, mode of operation and function as that disclosed and described in the page of the bulletin, a photostatic copy of which page is hereunto annexed and marked Exhibit "A"?

Answer to Plaintiff's Interrogatory No. 1

In answer to Interrogatory 1, the defendants Berkeley Pump Company, a co-partnership, and

Berkeley Pump Company, a corporation, did, prior to the commencement of the present action and subsequent to March 28, 1944, make and sell, within the Northern District of California, a pumping system substantially the same in construction, mode of operation and function as that disclosed and described in the page of the bulletin, a photostatic copy of which page was annexed to "Plaintiff's Interrogatories" and marked "Exhibit A."

Plaintiff's Interrogatory No. 2

If bulletin, Exhibit "A," does not show, disclose and/or describe in a substantially correct manner the construction, mode of operation and function of the pump system or pump structure, so manufactured, used and/or sold by said defendants, or any, or all of them, subsequent to March 28, 1944, and prior to July 22, 1947, and/or subsequent to July 22, 1947, and prior to the commencement of this suit, please point out, describe and indicate in detail wherein said Exhibit "A" does not show, disclose and describe in a substantially correct manner such pump system or pump structure, so manufactured, used and/or sold by said defendants, or any of them, within said periods within the Northern District of California.

Answer to Plaintiff's Interrogatory No. 2

No answer to this interrogatory is required in view of the answer to Interrogatory 1.

Plaintiff's Interrogatory No. 3

Did the defendants, or any, or all of them, subsequent to July 22, 1947, and prior to the commencement of this suit, make, use and/or sell within the Northern District of California, any pump system or pump structure substantially the same in construction, mode of operation and function as that disclosed in the figure identified by the written letter C in the circular, a photostatic copy of which is annexed hereto and marked Exhibit "B."

Answer to Plaintiff's Interrogatory No. 3

Defendant Berkeley Pump Company, a corporation, did subsequent to July 22, 1947, and prior to the commencement of this suit, make and sell, within the Northern District of California, a pumping system substantially the same in construction, mode of operation and function as that disclosed in the figure identified by the written letter C in the circular, a photostatic copy of which page was annexed to "Plaintiff's Interrogatories" and marked "Exhibit B."

Plaintiff's Interrogatory No. 4

If your answer to the preceding question is in the affirmative, state in detail the exact nature and character of said pump system or structure, and provide us with a drawing or drawings thereof illustrating in detail the character and type of such pump system or structure.

Answer to Plaintiff's Interrogatory No. 4

In answer to Interrogatory 4, a detailed description and illustration of the nature and character of the said pumping system referred to in answer to Interrogatory 3, is attached hereto and labeled "Defendants' Exhibit 1."

Plaintiff's Interrogatory No. 5

If the circular, Exhibit "B," does not show or disclose in a substantially correct manner the construction, mode of operation and function of such pump system or structure so manufactured, used, and/or sold by defendants, or any, or all of them, subsequent to July 22, 1947, and prior to the commencement of this suit, point out, describe and indicate in detail wherein said circular does not show and disclose in a substantially correct manner such pump system or structure so manufactured, used and/or sold by defendants, or any of them, within said period within the Northern District of California.

Answer to Plaintiff's Interrogatory No. 5

In view of the answer to Interrogatory 4, no answer is necessary to this interrogatory.

Plaintiff's Interrogatory No. 6 (a)

Referring to Paragraph I, Page 6 of defendants' answer, please state in detail with respect to each said Letters Patent Nos. 2,344,958 and 2,424,285:

(a) The facts upon which defendants will rely

to establish that the thing described and patented therein did not require the exercise and inventive faculty for its production, and

Answer to Plaintiff's Interrogatory No. 6 (a)

6. (a) In answer to Interrogatory 6 (a), as now advised defendants will rely upon the disclosures of all of those United States and foreign patents identified in "Defendants' Answer to Plaintiff's Oral Interrogatory" on file herein, the two patents in suit, and testimony to be subsequently adduced by deposition and at the trial of this cause.

Plaintiff's Interrogatory No. 6 (b)

6. (b) Identify any and all documentary evidence upon which you will rely in the establishment of such facts.

Answer to Plaintiff's Interrogatory No. 6 (b)

6. (b) In answer to Interrogatory 6 (b), as presently advised, defendants will rely upon all of those United States and foreign patents set forth in "Defendants' Answer to Plaintiff's Oral Interrogatory" heretofore on file herein, together with such other documentary evidence not presently known to defendants which may be adduced upon the taking of deposition and upon the taking of testimony at the trial of this cause.

Plaintiff's Interrogatory No. 7 (a)

7. Referring to Paragraph II, Pages 6 and 7 of defendants' answer:

(a) Identify the publications, if any, upon which defendants will rely to establish anticipation of each said Letters Patent Nos. 2,344,958 and 2,424,285, and state the date and page numbers thereof and at least one place where each of said publications may be inspected in the United States;

Answer to Plaintiff's Interrogatory No. 7 (a)

7. (a) In answer to Interrogatory 7 (a), as presently advised, the publications will consist of those United States and foreign patents identified in "Defendants' Answer to Plaintiff's Oral Interrogatory," and certain other publications not presently known to defendants which may be produced upon the taking of depositions and the testimony at the trial of this cause.

Plaintiff's Interrogatory No. 7 (b)

7. (b) Identify which of said publications, if any, will be relied upon to show the state of the art;

Answer to Plaintiff's Interrogatory No. 7 (b)

7. (b) In answer to Interrogatory 7 (b), the answer is the same as that given for Interrogatory 7 (a).

Plaintiff's Interrogatory No. 7 (c)

7. (c) Which of said publications, if any, will

be relied upon for any other purpose, and, if relied upon, for what other purpose?

Answer to Plaintiff's Interrogatory No. 7 (c)

7. (c) In answer to Interrogatory 7 (c), the answer is the same as that given for Interrogatory 7 (a).

Plaintiff's Interrogatory No. 8 (a)

8. Of the many domestic and foreign patents which defendants intend to rely upon at the trial to support their defenses of invalidity and non-infringement of said Letters Patent Nos. 2,344,958 and 2,424,285, please state:

8. (a) Which of said domestic and foreign patents defendants assert anticipate the claims of each said letters patent in suit?

Answer to Plaintiff's Interrogatory No. 8 (a)

8. (a) In answer to Interrogatory 8 (a), as presently advised, defendants will rely at the trial to support their defenses of invalidity and non-infringement upon all of those United States and foreign patents identified in "Defendants' Answer to Plaintiff's Oral Interrogatory."

Plaintiff's Interrogatory No. 8 (b)

8. (b) Which of said domestic and foreign patents defendants will rely upon to show the state of the art?

Answer to Plaintiff's Interrogatory No. 8 (b)

8. (b) In answer to Interrogatory 8 (b), the answer is the same as that given for Interrogatory 8 (a).

Plaintiff's Interrogatory No. 8 (c)

8. (c) Which of said domestic and foreign patents defendants will rely upon for any other purpose, and, if relied upon, for what other purpose?

Answer to Plaintiff's Interrogatory No. 8 (c)

8. (c) In answer to Interrogatory 8 (c), the answer is the same as that given for Interrogatory 8 (a), and defendants further state that said patents will be relied upon for all purposes.

Plaintiff's Interrogatory No. 9

9. Referring to Paragraph III, Page 7 of defendants' answer, state precisely wherein and in what respects the things patented in and by said letters patent, and each of them, were inoperative.

Answer to Plaintiff's Interrogatory No. 9

9. In answer to Interrogatory 9, defendants state that the things patented in and by said Letters Patent, and each of them, are inoperative in all respects set forth in said Letters Patent.

Plaintiff's Interrogatory No. 10

Referring to Paragraph IV, Page 7 of defendants' answer, state precisely wherein and in what

respects the things patented in or by said letters patent, and each of them, is not distinctly pointed out or described or claimed therein, as required by the Statutes of the United States.

Answer to Plaintiff's Interrogatory No. 10

10. In answer to Interrogatory 10, defendants state that the patents in suit themselves do not distinctly point out or describe or claim the alleged inventions, as required by the statutes of the United States.

Plaintiff's Interrogatory No. 11

11. Referring to Paragraph V, Page 7 of defendants' answer, state precisely wherein and in what respects the claims of said letters patent, and each of them, are vague, ambiguous or do not define or distinctly claim the invention, as required by the Statutes of the United States.

Answer to Plaintiff's Interrogatory No. 11

11. In answer to Interrogatory 11, defendants state that the claims of the Letters Patent themselves in all respects are vague, ambiguous and do not define or distinctly claim the alleged inventions as required by the statutes of the United States.

Plaintiff's Interrogatory No. 12

12. Referring to Paragraph VI, Page 7 of defendants' answer, state what patent and which claims thereof will be relied upon by defendants to

establish double patenting with respect to each said letters patent.

Answer to Plaintiff's Interrogatory No. 12

12. In answer to Interrogatory 12, defendants state that each patent and each of the claims thereof, and all prior patents and all of the claims thereof now owned by this plaintiff and so within the knowledge of this plaintiff, will be relied upon by defendants to establish double patenting with respect to each of said Letters Patent in suit and each claim thereof.

Plaintiff's Interrogatory No. 13

13. Referring to Paragraph VII, Page 8 of defendants' answer:

13. (a) State specifically the facts upon which defendants will rely to establish that the patentees of said letters patent, and each of them, were not the first, or any, inventors of the things respectively disclosed therein.

Answer to Plaintiff's Interrogatory No. 13 (a)

13. (a) In answer to Interrogatory 13 (a), as presently advised, defendants will rely upon the state of the art and each of the prior patents identified in "Defendants' Answer to Plaintiff's Oral Interrogatory," among other things, to establish that the patentees of each of the patents in suit were not the first, or any, inventors of the things respectively disclosed therein.

Plaintiff's Interrogatory No. 13 (b)

13. (b) State by specific description of structure or illustrate by drawing and description the particular pump system or apparatus, if any, which defendants will contend upon trial, constitutes prior invention by another party or parties, of the invention patented by the patentees of said letters patent.

Answer to Plaintiff's Interrogatory No. 13 (b)

13. (b) In answer to Interrogatory 13 (b), defendants state that as presently advised the specific description of the structures which defendants will contend upon the trial constitutes prior invention by another party or parties of the invention patented by said Letters Patent are those disclosed in each and every of the prior United States and foreign patents set forth in "Defendants' Answer to Plaintiff's Oral Interrogatory."

Plaintiff's Interrogatory No. 13 (c)

13. (c) State, as to each pump system or apparatus referred to in the foregoing sub-paragraph (b), the name or names and residences of the alleged prior inventors, and the names and residences of witnesses by whose testimony it is intended to prove prior inventions, or prior knowledge, and/or prior uses, if any.

Answer to Plaintiff's Interrogatory No. 13 (c)

13. (c) In answer to Interrogatory 13 (c), defendants state that as presently advised the name

or names and residences of the alleged prior inventors, and the names and residences of witnesses by whose testimony it is intended to prove prior inventions, or prior knowledge, and/or prior uses, if any, as presently advised, are the patentees of the United States patents and foreign patents set forth in "Defendants' Answer to Plaintiff's Oral Interrogatory" on file herein and residing at the places set forth in said patents.

Plaintiff's Interrogatory No. 14

14. Referring to Paragraph VIII, Page 8 of defendant's answer, state the facts specifically upon which defendants will rely to establish their claim that the patentees of said letters patent were not the joint inventors of the things disclosed in said letters patent.

Answer to Plaintiff's Interrogatory No. 14

14. In answer to Interrogatory 14, the facts specifically upon which defendants will rely to establish their claim that the patentees of the Letters Patent were not the joint inventors of the things disclosed in said Letters Patent are that said patentees did not jointly contribute to said inventions and were not joint inventors of the things disclosed in said Letters Patent.

Plaintiff's Interrogatory No. 15

15. Referring to Paragraph IX, Pages 8 and 9 of defendants' answer, state precisely what rulings

or rejections of the Patent Office, involving the respective applications of the applicants for said letters patent, were acquiesced in by said applicants, which estops plaintiff from claiming any scope or subject matter of said letters patent, or the claims thereof, as comprehends or embraces any apparatus or devices manufactured or sold or used by defendants.

Answer to Plaintiff's Interrogatory No. 15

15. In answer to Interrogatory 15, all of the rulings and rejections of the Patent Office involving the respective applications of the applicants for said Letters Patent which were acquiesced in by said applicants, are relied upon by defendants to estop plaintiff from claiming any scope or subject matter of said Letters Patent, or the claims thereof, as comprehends or embraces any apparatus or devices manufactured or sold or used by defendants, of all of which rulings or rejections plaintiff has full knowledge.

Plaintiff's Interrogatories No. 16

16. As to each patent upon which you intend to rely in support of any defense of prior invention, and which issued within one year prior to the respective application filing dates of plaintiff's patents Nos. 2,344,958 and 2,424,285 here in suit, or which issued subsequent to said filing dates, please state:

16(a) When the alleged inventor first conceived the invention therein described and claimed;

(b) When the alleged inventor first made a drawing illustrating his alleged invention;

(c) If such a drawing was made, attach a copy or photostat thereof to your answer;

(d) When the alleged inventor first disclosed his alleged invention to others, and to whom was such disclosure made;

(e) When the alleged inventor first made a written description of his alleged invention;

(f) If such a written description was made, attach a copy or photostat thereof to your answer;

(g) When did the alleged inventor first make or have made a device embodying his alleged invention;

(h) If the alleged inventor made or had made such a device, where can it be inspected by plaintiff;

(i) Describe in detail the construction, interrelation of parts and mode of operation of such device and attach to your answer a drawing illustrating the construction thereof;

(j) Where was such device used and how long was it used;

(k) When did said alleged inventor or any one authorized by him first sell or cause to be sold such a device, and where and to whom was such sale made.

Answer to Plaintiff's Interrogatory No. 16

16. In answer to Interrogatory 16, defendants do not at this time have the information requested by subdivisions (a) to (k) of said interrogatory, and, therefore, are unable to answer such interrogatory.

SECTION B

Plaintiff's Interrogatory 1

1. With respect to Paragraph A-X of the counter-claim herein of defendant-counterclaimant, Berkeley Pump Company, a corporation, state specifically, by name and address, which of defendant-counterclaimant's customers and prospective customers have been advised by plaintiff-counter defendant that pumps, pumping systems or pumping apparatus manufactured or sold or offered for sale by defendant-counterclaimant, constitutes an infringement of Letters Patent Nos. 2,344,958 and 2,424,285, and—

(a) Who, on behalf of plaintiff-counterdefendant, gave any such advice, and to whom;

SECTION B

Answer to Plaintiff's Interrogatories 1

1. In answer to Interrogatory 1, defendant, Berkeley Pump Company, a corporation, does not at this time have the name and address of the particular defendant-counterclaimant's customers and

prospective customers which have been advised by plaintiff-counterdefendant that the pumping systems or pumping apparatus manufactured or sold or offered for sale by defendant-counterclaimant constitutes an infringement of Letters Patent Nos. 2,344,958 and 2,424,285.

1 (a) In answer to Interrogatory 1 (a), defendant-counterclaimant does not have this information at this time, but alleges that said information is in the hands and within the knowledge of plaintiff-counterdefendant.

Plaintiff's Interrogatory 1 (b)

1 (b) The date on which said alleged advice was given, and whether the same was conveyed orally or in writing;

Answer to Plaintiff's Interrogatory 1 (b)

1. (b) In answer to Interrogatory 1(b), the answer is the same as that given for Interrogatory 1 (a).

Plaintiff's Interrogatory 1 (c)

1 (c) The specific nature of the alleged advice so given.

Answer to Plaintiff's Interrogatory 1 (c)

1. (c) In answer to Interrogatory 1 (c), the answer is the same as that given for Interrogatory 1 (a).

Plaintiff's Interrogatory 2

2. With respect to Paragraph A-XI of said counter-claim, state specifically, by name and address, which of defendant-counterclaimant's customers and prospective customers have been advised by plaintiff-counterdefendant that, if they purchase and use defendant-counterclaimant's pumps, pumping apparatus or pumping systems, they will be liable for infringement of plaintiff-counterdefendant's said patents Nos. 2,344,958 and 2,424,285, and

(a) Who, on behalf of plaintiff-counterdefendant, gave any such advice, and to whom;

Answer to Plaintiff's Interrogatory 2

2. In answer to Interrogatory 2, defendant-counterclaimant does not at this time have the name and address of its particular customers and prospective customers who have been advised by plaintiff-counterdefendant that if they purchase and use defendant-counterclaimant's pumping systems and apparatus, that they will be liable for infringement of plaintiff-counter-defendant's patents Nos. 2,344,958 and 2,424,285.

2 (a) In answer to Interrogatory 2 (a), defendant-counterclaimant does not have the information requested at this time, but states that said information is within the knowledge and possession of plaintiff-counterdefendant.

Plaintiff's Interrogatory 2 (b)

2(b) The date on which said alleged advice was given, and whether the same was conveyed orally or in writing;

Answer to Plaintiff's Interrogatory 2 (b)

2 (b) In answer to Interrogatory 2 (b), the answer is the same as that given for Interrogatory 2 (a).

Plaintiff's Interrogatory 2 (c)

2 (c) The specific nature of the alleged advice so given.

Answer to Plaintiff's Interrogatory 2 (c)

2 (c) In answer to Interrogatory 2 (c), the answer is the same as that given for Interrogatory 2 (a).

Plaintiff's Interrogatories Endorsed. Filed June 11, 1948.

Answers to Plaintiff's Interrogatories Endorsed. Filed June 25, 1948.

[Title of District Court and Cause.]

STIPULATION RE DEFENDANTS' PUMPS
AND PUMP SYSTEMS

It is hereby stipulated and agreed by and between plaintiff and defendants in the above entitled action, through their respective counsel, that all of said defendants prior to the commencement of this action and subsequent to the issuance of letters patent No. 2,344,958, here in suit, and that said defendant Berkeley Pump Company, a corporation, prior to the commencement of this action and subsequent to the issuance of letters patent No. 2,424,285, also here in suit, within the Northern District of California, Southern Division, have or has made and sold to others pumps and pump systems in all respects like the pumps and pump systems illustrated and described in Exhibits A, B, C, D and E of defendants, interrogatories filed herein on or about the 25th day of June, 1948.

Date: Jan. 20th, 1949.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff.

MELLIN & HANSCOM,

/s/ OSCAR A. MELLIN,

Attorneys for Defendants.

[Endorsed]: Filed May 11, 1949.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Goodman, District Judge.

The evidence introduced at the trial of this patent infringement suit clearly established that some of the claims of the two patents assigned to the plaintiff, if they are valid, have been infringed by pumps which the defendant has manufactured and sold. The principal and most difficult issue to resolve is whether these claims are void for want of novelty or invention.

The two patents relate to centrifugal pumps, both with and without attached injector assemblies, and pumping systems of which such pumps and assemblies are a part. Both centrifugal pumps and injector assemblies are old in the art. The inventions claimed constitute improvements on the earlier pumps and pumping systems. A brief description of centrifugal pumps and injector assemblies and how they were employed in older pumping systems will aid in understanding the nature of the plaintiff's improvements.

Basically, a centrifugal pump consists of a disc-shaped impeller mounted on a motor-driven shaft within a casing. The shaft may be disposed either vertically or horizontally. Between the two discs forming the base and the top of the impeller and integrally connecting them are ribs curving outwardly from the center to the edge of the discs. When the impeller is in rotation, a suction is created which

will draw the water from the well up a suction pipe into a chamber at the bottom of the casing and thence into the impeller, itself, through the eye at the center of its base. The water will be centrifugally discharged from the impeller radially through the passages defined by its ribs into a surrounding chamber. By virtue of the centrifugal force created by the rotation of the impeller, the water will have acquired a pressure higher than at intake. The amount of pressure thus obtained will depend upon the size of the impeller and its speed of rotation. If a single impeller is not capable of creating the desired pressure, the water may be directed through additional impellers. These impellers may be mounted on the same shaft in a series above the first impeller if the shaft is vertically disposed or along side the first impeller if the shaft is horizontally disposed. As the water emerges from each impeller it will be directed to the eye of the next impeller. The pressure of the water will be progressively increased as it passes through each impeller. From the last impeller the water will discharge into a chamber tapped by the service line.

Often the consumer will use water from the same source for different purposes, as for example, for irrigation and for household use. Each purpose may require a different water pressure. A separate pump may, of course, be used to supply the water at each pressure. But, a single pump capable of supplying water at different pressures would ordinarily be preferable. A single centrifugal pump can be made

to discharge water at various pressures in at least two ways. The water being sucked from the well may be divided before it enters any of the impellers. A portion may be directed into one set of impellers, while the remainder is directed through another set of impellers which differ in size or in number from those of the first set. The water emerging from each set will be at a different pressure. Although both sets of impellers may be mounted on the same shaft, they will not be in series because none of the water will pass through both sets of impellers. Impellers arranged in this manner are said to be in parallel.

A multi-pressure centrifugal pump may also be constructed by mounting the impellers in series and bleeding off some of the water at one of the earlier impeller stages while permitting the remainder of the water to pass through all the impellers. With this arrangement, some of the impellers may be thought of as doing double duty, since all of the water will pass through the earlier impellers and only part of the water will pass through the last impellers. Since the plaintiff's patents relate to multi-pressure centrifugal pumps with the impellers arranged in series, it is with such pumps that the subsequent discussion will be concerned.

Multi-pressure centrifugal pumps of the type just described are old in the art. But of the specific models brought to the Court's attention, none were designed specifically to supply water at different pressures simultaneously. The discharge openings tapping the various impeller stages were equipped

with control valves with the intention that only one would be open at a time.

In some of these models the impellers were mounted one above the other on a vertically disposed shaft; in others they were mounted side by side on a horizontally disposed shaft. While a steady, simultaneous multi-pressure discharge might have been obtained from the models with the vertical shaft, it could not be assured. In all of these models the discharge opening at the first impeller stage was lower than the eye of the second impeller. If the control valve at this discharge opening were open too wide in relation to the volume of water being sucked into the pump, all of the water would flow out this discharge and none of it would pass on through the upper impellers to the high-pressure discharge.

In one of the models having a horizontal shaft—the Ensslin model, United States patent number 1,494,595—the discharge openings were at the top of the casing immediately above each impeller stage tapped. It seems likely that a steady simultaneous discharge of water at several pressures could have been obtained from this pump. Barring some unusual internal pump structure, the eye of the second impeller by the force of gravity would necessarily be submerged in the water emerging from the first impeller before the water could flow out the discharge opening. However, the internal construction of this pump is not disclosed in the drawings, nor in detail in the specifications which state that the pump was designed to supply water at variant pressures alternately rather than simultaneously.

Centrifugal pumps are limited in their ability to raise water from a well, and in actual practice, are used to lift water a maximum of 20 to 25 feet. For deeper wells, an injector assembly is employed to boost the water from the well up the suction pipe to a point where the pump can lift it the rest of the way. When an injector assembly is part of the pumping system, a portion of the water discharged from the centrifugal pump will be directed down a pressure pipe back into the well. The pressure pipe may be either concentric with or parallel with the suction pipe, but it will lead into the suction pipe through a nozzle. The water being forced through the nozzle at a high pressure will create a suction and draw water from the well with it up the suction pipe to a point where the suction created by the pump will be effective to draw the water into the pump.

The centrifugal pump itself operates in the same manner with or without an injector assembly attached. But special difficulties are presented in supplying a multi-pressure discharge from a centrifugal pump with an injector assembly attached. The injector assembly requires a certain minimum volume and pressure of water for continued operation. Therefore if too much of the water is permitted to flow from a discharge opening tapping one of the earlier impeller stages of the pump unit, insufficient water will pass through the pump to supply the injector assembly. When there is no injector assembly in the system, if an excessive volume of water flows

out the low pressure discharge, the result will be merely the starving of the high pressure discharge for water. But with an injector assembly in the system, the result will be the stalling of the entire system.

Furthermore when an injector assembly is part of the system a similar problem is presented even though only a single discharge to service is desired. Some means must be provided to divide the water between the service line and the pressure line leading to the injector so as to assure the injector of an ample supply of water. If the single service line is supplied from an early impeller and the injector from the last impeller, the problem presented is the identical one of dividing the water between the service line discharge opening and the eye of the succeeding impeller. If both the service line and the pressure line to the injector are supplied from the last impeller stage, the problem of division is somewhat different, but present, nevertheless.

The prior art discloses systems in which various means were employed to attempt to solve these problems. United States patent number 2,150,799 to Frank Jacuzzi describes a system with a single discharge to service, the service line and the injector both being supplied from the last impeller stage. A control valve at the service line opening regulates the volume and pressure of the stream of water supplying the injector.

A system with a dual discharge to service is depicted in United States patent number 1,758,400 to

Rachelle Jacuzzi. Both the high-pressure service line and the injector are supplied from the last or single impeller stage of the pump. There is a control valve at the high-pressure discharge opening to regulate the amount of water flowing out of it. The suction line leading from the well to the pump intake is tapped for the low pressure discharge to service. It is not possible to tap the suction line when a centrifugal pump alone must draw the water from the well, because the pump would suck in air through the opening in the line. But, when an injector assembly is forcing water up the suction line, the line may be tapped at a point below where the suction from the pump unit takes effect. A control valve and also a pipe elbow with its vertical portion extending up higher than the pump intake are employed at this suction line opening to prevent all the water from being drained out of the low-pressure discharge. Tapping the suction line is not the perfect means of providing a low-pressure discharge. This is so because the control valve must be properly set and periodically adjusted to assure that sufficient water will pass by the opening and be drawn into the pump to supply the injector assembly. And, the testimony indicated that a suction line discharge is fraught with other difficulties.

In the Italian patent number 139,161 to Veronesi and the German patent number 376,684 to Speck the single service line and the injector are supplied from different sets of impellers in parallel on a sin-

gle shaft. The extra number of impellers required for this arrangement should make it less desirable, however, than a system in which the pump impellers are in series.

In the model described in the British patent number 382,592 to Schmid the water is discharged from the first impeller into a pressure tank. Water at low-pressure is drawn off at the top of this tank for consumer use and a second impeller which feeds only the injector is supplied with water through an opening at the bottom of the tank. Thus a supply of water to the injector is assured.

In the Italian patent to Veronesi number 260,417 a centrifugal pump with a horizontal shaft is pictured. The injector assembly is supplied from the last impeller stage. At the top of the casing, immediately above the first impeller stage is a discharge opening. The drawing does not picture a passage-way from the chamber surrounding the first impeller leading to this opening. But an arrow depicting the flow of water is drawn from this chamber to the opening, thus indicating that the passage-way is there. In this pump, as in the Ensslin model previously described, the force of gravity would accomplish the division of the water between the low pressure discharge and the succeeding impellers by favoring the impellers. The eye of the second impeller being lower than the discharge opening will be submerged before the water will flow from the opening. The plaintiff earnestly urges that the structure described is not sufficiently disclosed because the

draftsman indicated the passageway merely by the flow arrow and not by dotted lines as is the orthodox engineering practice. This question will be considered later.

This in brief was the state of the prior art as presented to the Court by the parties. The plaintiff's two patents in general relate to systems in which water at various pressures can be obtained simultaneously from a single centrifugal pump for consumer use and to operate an injector assembly. The impellers of the pump unit are in series and various impeller stages are tapped to secure the water at different pressures.

Of the claims of Patent No. 2,424,285, some merely describe a pump unit with a multi-pressure discharge for consumer use. Others relate to a system in which an early impeller stage of the pump unit is tapped for a low-pressure service line, and the final impeller stage supplies an injector and a high-pressure service line. The feature of plaintiff's pump and system which represents the real improvement over prior pumps and systems is the means of positively dividing the water between each discharge opening at an early impeller stage and the succeeding impellers which feed the high-pressure service lines or an injector or both.

Plaintiff divides the water in the following manner: In the side walls of the chamber surrounding each impeller are a number of port holes. As the impeller rotates a similar stream of water will be forced through each one of these ports. The water is dis-

charged through these ports into passage-ways leading up over the top wall of the impeller chamber to the eye of the second impeller. If the impeller stage is tapped by a discharge opening, the passage-ways are constructed so that those from a few of the ports will lead not to the eye of the second impeller but to the discharge opening. This means of division does not merely favor the second impeller eye. It positively divides the water between the impeller eye and the discharge opening so that both are always assured of a supply of water.

The water from the last impeller stage of plaintiff's pump discharges into a small chamber. If both an injector and a high-pressure service line are to be supplied from the last impeller stage, some means must be provided to divide the water between them. It would seem that plaintiff might have effected this division in the same manner as he previously divided the water between the low-pressure discharge opening and the eye of the succeeding impeller. However, plaintiff chose to place a control valve at the opening to the high-pressure line to control the flow of water.

Then plaintiff apparently conceived the idea that if only the injector were supplied from the last impeller stage, and a previous impeller stage were tapped from the high-pressure discharge, this control valve could be eliminated. This arrangement also has another advantage. If a well is very deep the pressure required to operate the injector may be much greater than would be required for any pur-

pose of the consumer. Thus if the water for consumer use is drawn off at an early impeller stage, the consumer is saved the expense of raising all the water to the pressure required by the injector. The idea of isolating the injector so that it alone is supplied from the last impeller stage is the subject of plaintiff's second patent number 2,344,958. The claims of the two patents fail to express clearly the line of division between them, and one must resort to the specifications to determine it. Broadly speaking patent number 2,424,285 is intended to cover the concept of obtaining a simultaneous multi-pressure discharge from a centrifugal pump with its impellers in series, and of obtaining the simultaneous discharge, without danger of stalling the attached injector assembly. Patent number 2,344,958 is intended to cover the concept of providing the service discharge from an impeller stage other than that from which the injector is supplied.

The defendant's pumping systems are designed to accomplish these same purposes, and are substantially the same as the plaintiff's except for the means employed to divide the water between the low pressure discharge opening and the eye of the succeeding impeller. Plaintiff employs the system of ports and passages to positively divide the water between the discharge opening and the eye. Defendant applies the force of gravity to favor the eye of the impeller over the discharge opening. It has been previously explained that in pumps with a horizontal shaft, the force of gravity would necessarily

keep the eye of the second impeller submerged although water is running out the discharge opening tapping the first impeller stage. The defendant had adapted a pump with a vertical shaft to utilize the force of gravity for this purpose. In defendant's two-impeller model the first impeller stage is so constructed that the water discharges into a chamber which extends up past and higher than the second impeller. The low-pressure discharge opening is in the wall of this chamber at its highest point. The second impeller is reversed so that its eye faces upward rather than downward, and will always be submerged by the water in the chamber before the water reaches the height of the discharge opening. In the defendant's three stage model, the chamber extends up past and higher than both the second and third impellers. The eyes of both of these impellers face upward. The chamber is tapped at its highest point for the low-pressure discharge. The eye of the top impeller is submerged by the water in the chamber. The top impeller may be tapped for a second discharge to service although it feeds directly into the middle impeller below it. The middle impeller stage which will be the stage of highest pressure supplies the injector.

It is clear that the defendant's systems infringe those of the plaintiff unless the precise means of dividing the water between the discharge opening and the impeller eye is made an essential element of plaintiff's claims. Plaintiff's system of ports and passages is an essential element in some of his

claims. Other of his claims, however, are not so limited. These claims, plaintiff alleges, have been infringed and they clearly have been.

Considering plaintiff's systems as a whole it is apparent that they are both useful and novel. No prior systems are substantially identical with plaintiff's systems. But each claim alleged to have been infringed must separately meet the tests for novelty as well as invention¹, although of course each may be construed in relation to the others² and the specifications³.

The nine claims of the second patent No. 2,344,958, with the exception of claim 3 which is not alleged to have been infringed, vary only in details not germane to the question of invention. They may therefore be considered as a unit. All of them describe a system in which a pump unit with its impellers in series is tapped at an early impeller stage to feed a service line and at a subsequent impeller stage of higher pressure to feed an injector assem-

¹Continental Paper Bag Company v. Eastern Paper Bag Company, 210 U. S. 405, 419 (1908); *In re Garrett*, 63 F. 2d 113, 114 (C.C.P.A. 1933); 2 Walker On Patents 770 and 1231 (Deller's Edition 1937).

²*In re Arendt*, 74 F.2d 765, 768 (C.C.P.A. 1935).

³*Carnegie Steel Company v. Cambria Iron Company*, 185 U. S. 403, 432 (1902); *Howe Machine Company v. National Needle Company*, 134 U. S. 388, 394 (1890); *Greenowalt v. American Smelting & Refining Co.*, 10 F.2d 98 (9 Cir. 1926); 2 Walker On Patents 1242 (Deller's Edition 1937).

bly. Some of them specify that the discharge passage to the service line is valve free and others do not.

Consideration of the prior art previously described makes it apparent that there can be no invention disclosed in claims so broad as these⁴. The system described is the precise system pictured in the drawings of the Italian patent number 260,417 to Hugo Veronesi. The question posed by the plaintiff as to whether the Veronesi drawing makes it sufficiently clear that the first impeller stage is tapped by the discharge opening must be answered in the affirmative. The defendant introduced the deposition of Davide Veronesi, Hugo's son, to show that the drawing was intended to picture a pump with the service line and the injector supplied from different stages, and also that such pumps were manufactured and sold in Italy. This testimony of course is immaterial, since the plaintiff is bound by nothing not disclosed on the face of the patent. (R. S. §4923, 35 U.S.C. §72.) The defendant also introduced certain Italian catalogues distributed by Hugo and Davide Veronesi which picture and describe their pumps. Although these catalogues con-

⁴For a discussion of the consideration which mitigate against a finding of invention where claims are too broad see *O'Reilly v. Morse*, 56 U. S. 61, 112 (1853). See also *Edison v. American Mutoscope Co.*, 114 Fed. 926, 934 (2 Cir. 1902); *Bracewell v. Passaic Prin Works*, 107 Fed. 467, 473 (C.C.S.D.N.Y. 1901); *Auto Hone Co., Inc. v. Hall Cylinder Hone Co.*, 3 F.2d 479, 482 (N.D., Ohio 1924).

stitute a printed publication of a type which would bind the plaintiff, they do not picture the internal structure of the pumps illustrated. Since no translation of their descriptive passages was furnished the Court, they can be disregarded.

Admittedly there are no dotted lines in the Veronesi patent drawing showing a passage through the pump casing from the chamber surrounding the first impeller to the discharge opening. But, the only reasonable purpose of the flow arrow drawn from the impeller chamber to the opening would be to indicate that the passage is there. Although dotted lines may be the standard method of indicating such passageways, they are not always so used. This is significantly demonstrated by the drawings in plaintiff's own patents. Plaintiff has failed to indicate at least one obvious passageway in his drawings either by dotted lines or a flow arrow. But, plaintiff contends that a passage from the first impeller chamber to the discharge opening in the Veronesi pump is negatived by certain statements in the specifications. This same argument was advanced when this patent was cited as a reference in the patent office and apparently was accepted by the examiner. These statements are to the effect that water issuing from the exhaust of the pump is divided into two portions, one portion being directed to the place of utilization and the other to the injector. The flaw in this argument is that the patent is not directed to the pump unit at all, but rather to the injector.

The inventor states that the injector "is not oper-

ated by a special pump, but operates with any suitable type of pump." The statements in the specifications were intended to refer to pump units in general and not to the particular pump which the inventor chose to attach to the injector in the drawings.

However, since the invention claimed in this patent was the injector, there is nothing in the patent to indicate the significance of a discharge passage from an early impeller stage of the pump unit and the isolation of the injector at the last impeller stage. For this reason, perhaps, the drawing should not in itself be considered a complete anticipation of plaintiff's system. But this drawing when considered in connection with such other prior art as the system described in the Schmid patent clearly points the way to such a system as claimed in plaintiff's patent No. 2,344,958. In the Schmid model the first impeller did not feed directly into the second, but indirectly through a pressure tank. But, the basic idea of feeding the discharge line from one impeller and the injector from a succeeding impeller was embodied in this model. The Veronesi drawing showed how it might be accomplished without the intervening pressure tank. Furthermore, disregarding the absence of control valves, plaintiff's system would be duplicated merely by connecting an injector to one of the discharge connections of the old multi-discharge centrifugal pumps. Merely removing the control valves accomplishes nothing in itself. The control valves are made unnecessary only because of plaintiff's means of dividing the water

between the discharge opening and the succeeding impeller eye. It must be concluded that the claims 1, 2, 4, 5, 6, 7, 8 and 9 of the patent number 2,344,958 are invalid for want of invention.

The claims of patent 2,424,285 which plaintiff alleges to have been infringed are 3, 9-14, 17 and 18. Claim 13 in substance is identical with those claims in patent 2,344,958 which do not specify that the discharge opening to service is valve free. Claims 9 and 10 are the same as claim 13 except that instead of stating merely that each impeller stage of the pump feeds into the succeeding stage they emphasize that each stage feeds "directly" into the succeeding stage. There is no invention in the direct feed. Such a feed is found in many of the prior multi-pressure centrifugal pumps. One would have only to connect an injector to those pumps to have the system described in these claims.

Claim 11 relates to a system in which two pumps are employed. The water from the low-pressure pump is discharged into a chamber having an outlet to service and also an outlet to the high-pressure pump which supplies the injector. This system is fully anticipated by the British patent to Schmid, number 383,592. This patent was cited as a reference by the patent examiner. But the file wrapper shows that claim 11 was not in the original application but was added later as a prelude to an interference proceeding and thus the Schmid patent was apparently never considered in relation to this claim. This claim, however, is not infringed by the

defendant's systems. There is a significant difference between systems employing only one pump and those employing two.

Claim 12 describes a system consisting of an injector assembly; a pump with its impeller stages adjacently disposed on a common shaft and feeding one into the other in series, and with a discharge outlet at one of these stages; and "means for delivering to said discharge outlet, fluid at one pressure; and means for delivering fluid to said nozzle at a pressure in excess of that at said discharge outlet." This system could be duplicated by attaching an injector to one of the multi-discharge pumps with control valves. It is also pictured in the Veronesi drawing.

Claim 14 describes a pump with its impeller stages in series, having a discharge passage leading from the last stage, another discharge passage leading from an intermediate stage, a valve means in at least one of said discharge passages for limiting the minimum pressure of flow there through—and a by-pass passage directed downwardly from a stage in said series, above the intermediate stage. Disregarding this by-pass passage, which is certainly not an inventive difference, this claim is descriptive of any of the early centrifugal pumps with dual discharge outlets.

Claim 3 describes a system having a pump unit with its impeller stages in series; a discharge passage leading from an early stage of the pump unit; a discharge passage leading from a subsequent stage

of said pump unit; a by-pass passage directed downwardly from a state of high pressure in said series and connected to an injector assembly. In substance this claim is identical with claim 14 except that it specifies that an injector assembly is to be connected with the by-pass passage. As previously indicated, there is no invention in connecting an injector assembly to a pump unit no different from prior pump units.

The short answer to the question of validity is that plaintiff in all of these claims has attempted to include virtually every possible system in which a multi-pressure discharge is supplied from a pump with an injector attached. The state of the prior art is such that plaintiff is not entitled to such a monopoly. The new and significant feature of plaintiff's systems is the means of positively dividing the water between a discharge outlet tapping an impeller stage and the eye of the succeeding impeller. Those claims directed specifically to this means have not been alleged to have been infringed and their validity need not be determined. It might be noted, however, that even this means of division is not entirely new. The system of ports and passages for directing water from an impeller chamber to the eye of the succeeding impeller was described and claimed in the United States patent to Frank Jacuzzi, Number 2,150,799. All plaintiff did was to adapt this system of ports and passages to a dual discharge pump by reconstructing some of the pas-

sages to direct the water to the discharge opening rather than to the eye of the succeeding impeller.

Claims 17 and 18 describe a system in which a dual-discharge pump is connected so that one discharge feeds into a pressure tank. There is free communication between the pressure tank and the low-pressure discharge line so that pressure equalization will occur throughout the system during the quiescent periods. Thus, if water is drawn from the low pressure line, when the pressure falls below a certain value, an automatic pressure switch will start the pump. Plaintiff seems to assume that by adding a pressure tank and switch to his multi-pressure centrifugal pump, he achieves a distinct invention. This assumption is fallacious. Pressure tanks and switches are, of course, old in the art. If the high-pressure discharge of one of the old multi-pressure centrifugal pumps were connected to a pressure tank and switch, and the low-pressure discharge control valve left partially open, the pump would automatically start when sufficient water was drawn off through the low-pressure line. Plaintiff devised a means of positively dividing the water between the discharge outlet and succeeding impeller stages, and still maintain the open communication throughout a multi-pressure discharge system is not unique with plaintiff's system and is not a separate invention.

Claims 3, 9, 10, 12, 13, 14, 17 and 18 of patent number 2,424,285 have been infringed, but for the

reasons stated are void for want of invention. Claim 11 has not been infringed, but is void for want of novelty.

Judgment accordingly⁵.

Dated: February 23rd, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

DEFENDANTS' AND COUNTERCLAIMANT'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California, the Court makes the following Findings of Fact and Conclusions of Law:

⁵What has been stated, in my opinion, sufficiently sets forth findings of fact and Conclusions of Law. It is so intended. However, if counsel wish to present findings in a separate document, they may do so, provided they are confined to the considerations upon which the decision rests.

Findings of Fact

1.

Plaintiff, Jacuzzi Bros., Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at Richmond, County of Contra Costa, State of California.

2.

Defendant, Berkeley Pump Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at Berkeley, County of Alameda, State of California.

3.

The defendant, Berkeley Pump Company, a partnership, was a partnership composed of the individual defendants, Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnne T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, which partnership did business under the said name of Berkeley Pump Company at Berkeley, County of Alameda, State of California, and that said partnership was dissolved on August 1, 1946.

4.

Plaintiff, Jacuzzi Bros., Incorporated, is the owner of all the right, title and interest in, to and

under the Letters Patent in suit Nos. 2,344,958 and 2,424,285.

5.

The two patents in suit both relate to multi-stage centrifugal pumps with low and high pressure discharge openings both with and without attached injector assemblies, and pumping systems of which such pumps and assemblies are a part. Both multi-stage centrifugal pumps with high and low pressure discharge openings and injector assemblies are old in the art.

6.

The claims of the two patents in suit fail to express clearly the line of division between them, and one must resort to the specifications to determine it; for example, claim 13 of patent No. 2,424,285 in substance is identical with those claims in patent No. 2,344,958 which do not specify that the discharge opening to service is valve free.

7.

The absence of control valves in the patented systems is unimportant because merely removing the control valves accomplishes nothing in itself. The control valves are made unnecessary only because of the means shown in the patents in suit of dividing the water between the discharge opening and the succeeding impeller eye.

8.

The significant feature of the pumping systems of the patents in suit is the means of positively dividing the water between a discharge outlet tapping an impeller stage and the eye of the succeeding impeller. This means of division is not entirely new and is described in prior United States patent No. 2,150,799 (Defendants' Exhibit T). All the patentee in the patents in suit did was to adapt the system of ports and passageways so shown in the prior United States patent No. 2,150,799 (Defendants' Exhibit T) to a dual-discharge pump by reconstructing some of the passages to direct the water to the discharge opening rather than to the eye of the succeeding impeller.

9.

That the defendants' accused pumping system is a system which includes a multi-stage centrifugal pump with the impellers arranged in series on a vertical shaft. An injector assembly is connected to and is supplied from the high-pressure discharge of the last impeller stage of the centrifugal pump. A low-pressure discharge opening is tapped into the first stage so that there may be a simultaneous discharge of water to service or use from the first stage at one pressure and a discharge to the injector from the last stage at a higher pressure.

10.

In the defendants' accused pumping system the

force of gravity accomplishes the division of water between the low-pressure discharge outlet and the next succeeding impeller by arrangement of the eye of the said impeller at an elevation lower than the low-pressure discharge opening so that such impeller eye is always submerged and is fully supplied before water can flow through the low-pressure discharge opening.

11.

That defendants' accused pumping system does not employ the means of the patents in suit of positively dividing the water between a discharge opening tapping an impeller stage and the eye of the succeeding impeller, but instead arranges the eye of the impeller to be fed at a lower elevation than the discharge opening so that the force of gravity will keep the eye of the impeller submerged although water is discharging through the discharge opening, which use of the force of gravity for the same purpose was old and well known long prior to the patents in suit and is inherent in the pumps of prior art patents Nos. 730,842, 1,494,595 and 260,417, Defendants' Exhibits Nos. P, R and N.

As to the Prior Art

12.

Multi-pressure centrifugal pumps of multi-stage character with the impellers in series and having a

discharge at an earlier impeller stage to discharge part of the water thereat while directing the remainder of the water through the remaining stages and discharge were old in the art long prior to the suit and are exemplified in the prior patents to Veronesi, No. 260,417, Sulzer, No. 704,144, Rateau, No. 730,842, Stepanoff, No. 2,248,3312, Ensslin, No. 1,494,595 and Schmid (British), No. 382,592, Defendants' Exhibits Nos. N, O, P, Q, R and V, respectively.

13.

Prior art patent to Ensslin, No. 1,494,595, Defendants' Exhibit R, discloses a multi-stage pump with a discharge opening for each impeller stage. A steady simultaneous discharge of water at several pressures can be obtained from this pump.

14.

Prior art patent No. 2,150,799 (Jacuzzi), Defendants' Exhibit T, discloses a pumping system including a multi-stage centrifugal pump and an ejector with a discharge to service and a discharge to the injector, both discharges being supplied from the last impeller stage of the pump. A control valve regulates the volume and pressure of the stream of water supplying the ejector.

15.

Patent No. 1,758,400 (Jacuzzi), Defendants' Exhibit S, discloses a pumping system with a dual

discharge to service and a high-pressure discharge to the injector. Both the high-pressure service line and the injector are supplied from the last (single) impeller stage of the pump. The suction line leading from the well to the pump (supplied by the injector) is tapped for low-pressure discharge to service.

16.

Prior art Italian patent No. 139,161, Defendants' Exhibit M, discloses a multi-stage centrifugal pump with sets of impellers in parallel and an injector. The intake water is divided as it enters the pump, part going to one set of impellers and discharged for use at low pressure, the remainder going to the second set of impellers and discharged under a higher pressure solely to supply the injector.

17.

Prior patent to Speck No. 376,684, Defendants' Exhibit U, is similar in all respects to the system of Italian patent No. 139,161, Defendants' Exhibit M, except the discharge to use is at a pressure higher than the discharge to the injector.

18.

The Schmid patent No. 382,592, Defendants' Exhibit V, discloses the basic idea of feeding a service discharge line from one impeller at one pressure and feeding the injector from a succeeding impeller at a higher pressure.

19.

The prior Italian patent to Veronesi, No. 260,417, Defendants' Exhibit N, discloses a pumping system including a multi-stage centrifugal pump with the impellers arranged in series on a horizontal shaft. An injector assembly is connected to and is supplied from the high-pressure discharge of the last impeller stage of the centrifugal pump. A low-pressure discharge opening is tapped into the first stage so that there may be a simultaneous discharge of water to service or use from the first stage at one pressure and a discharge to the injector from the last stage at a higher pressure.

20.

In the pump disclosed in Italian patent to Veronesi, No. 260,417, Defendants' Exhibit N, the force of gravity accomplishes the division of water between the low-pressure discharge outlet and the next succeeding impeller by the arrangement of the eye of the intake of said impeller at an elevation lower than the low-pressure discharge opening so that such impeller eye is always submerged and is fully supplied before water can flow through the low-pressure discharge opening.

21.

That the Italian patent to Veronesi, No. 260,417, Defendants' Exhibit N, clearly discloses on its face the obvious presence of a low-pressure discharge

opening communicating with the first impeller stage of the centrifugal pump for a low-pressure discharge to service.

22.

There are no dotted lines in the Veronesi patent drawing showing a passage through the pump casing from the chamber surrounding the first impeller to the discharge opening. But, the only reasonable purpose of the flow arrow drawn from the impeller chamber to the opening clearly indicates that the passage is there. Although dotted lines may be the standard method of indicating such passageways, they are not always so used. This is significantly demonstrated by the drawings of plaintiff's own patents in suit Nos. 2,424,285 and 2,344,958, where plaintiff failed to indicate at least one obvious passageway in his drawings, either by dotted lines or a flow arrow.

23.

The presence of a low-pressure discharge opening and passageway from the chamber of the first impeller stage of the centrifugal pump disclosed in Veronesi patent No. 260,417, Defendants' Exhibit N, is not negated by the statement in the specification of that patent to the effect that water after being raised to the desired pressure is divided into two portions, one portion being directed to the place of utilization and the other to the injector.

As to Patent No. 2,344,958

24.

The claims of patent in suit No. 2,344,958 are intended and purport to cover the idea of isolating the injector so that it alone is supplied from the last impeller stage, and providing a service discharge from an impeller stage other than that from which the injector is supplied.

25.

Claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 all describe a pumping system in which a pump unit with its impellers in series is tapped at an early impeller stage to feed a service line and at a subsequent impeller stage of higher pressure to feed an injector assembly and these claims differ only in details not germane to the question of invention.

26.

Claim 3 of patent No. 2,344,958 varies from the remaining nine claims of said patent only in a detail not germane to the question of invention, which detail is that it includes an additional discharge at an impeller stage preceding the impeller stage to which the injector nozzle is connected, which specification of an additional low pressure or service discharge adds nothing patentable to the said claim and the same is therefore invalid as being met by the prior art in the same manner as the remainder of the nine claims of the patent.

27.

The pumping systems claimed in claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent in suit No. 2,344,958 would be duplicated without invention merely by connecting an injector to one of the high-pressure discharge connections of the old and well known multi-discharge centrifugal pumps such as shown in patents Nos. 704,144; 730,842; 2,248,312 and 1,494,595, Defendants' Exhibits Nos. O, P, Q and R.

28.

Claim 3 of patent No. 2,344,958 would be duplicated without invention merely by connecting an injector to one of the high-pressure discharge connections of the old and well known centrifugal pumps such as shown in patents Nos. 704,144; 730,842; 2,248,312 and 1,494,595, Defendants' Exhibits Nos. O, P, Q and R.

29.

The pumping system described in claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 is the precise system clearly disclosed in the prior Italian patent No. 260,417 to Hugo Veronesi, Defendants' Exhibit N.

30.

The claims in suit Nos. 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 are so broad that they define no invention and are invalid.

31.

The claims in suit Nos. 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 do not define an invention over the prior art and are invalid for want of invention.

32.

Patent in suit No. 2,344,958 fails to disclose and claim an invention patentable over the prior art and is, therefore, invalid for want of invention.

33.

The claims in suit Nos. 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 if valid have been infringed by defendants.

At to Ptaent No. 2,424,285

34.

Of the claims of patent No. 2,424,285 some merely describe a pump unit with a multi-pressure discharge for consumer use. Others relate to a pumping system in which an early impeller stage of the pump unit is tapped for a low-pressure service line, and the final impeller stage supplies an injector and a high-pressure service line.

35.

Claims 9 and 10 of patent No. 2,424,285 are the same as claim 13 thereof except that instead of stating merely that each impeller stage of the pump feeds into the succeeding stage, they emphasize that each stage feeds "directly" into the succeeding

stage. There is no invention in the direct feed. Such a feed is found in many of the prior multi-pressure centrifugal pumps. One would have only to connect an injector to those prior pumps to have the system described in these claims.

36.

The pumping system defined in claim 11 of patent No. 2,424,285 is fully anticipated by the disclosure of British patent to Schmid No. 382,592, Defendants' Exhibit No. V.

37.

Claim 12 of patent No. 2,424,285 defines a pumping system which could be duplicated without invention by merely attaching an injector to one of the prior art multi-discharge pumps with control valves. It is also completely disclosed in the Veronesi patent No. 260,417, Defendants' Exhibit N, and hence the claim fails to define a patentable invention.

38.

Claim 14 of patent No. 2,424,285 is completely descriptive of any of the earlier prior art centrifugal pumps with dual-discharge outlets except for the inclusion of a by-pass passage which adds nothing inventive to the system and hence said claim fails to define a patentable invention.

39.

Claim 3 of patent No. 2,424,285 is in substance identical with claim 14 thereof except it additionally specifies that an injector is to be connected with the by-pass passage and fails to define a patentable invention in that there would be no invention involved in connecting an injector assembly to a pump unit no different from prior art pump units.

40.

Claims 17 and 18 of patent No. 2,424,285 describe a system in which a dual-discharge pump is connected so that one discharge feeds into a pressure tank. There is free communication between the pressure tank and the low-pressure discharge line so that pressure equalization will occur throughout the system during quiescent periods. Thus, if water is drawn from the low-pressure line, when the pressure falls below a certain value, an automatic pressure switch will start the pump. Plaintiff seems to assume that by adding a pressure tank and switch to its multi-pressure centrifugal pump, it achieves a distinct invention. This assumption is fallacious. Pressure tanks and switches are, of course, old in the art. If the high-pressure discharge of one of the old multi-pressure centrifugal pumps were connected to a pressure tank and switch, and the low-pressure discharge control valve left partially open, the pump would automatically start when sufficient water was drawn off through the low-pressure line.

41.

That claims 3, 9 to 14, inclusive, 17 and 18 of patent No. 2,424,285 are so broadly drawn as to include virtually every possible system in which a multi-pressure discharge is supplied from a pump with an ejector attached.

42.

Claims 1, 2, 4 to 8, 15 and 16 of patent No. 2,424,285 are so broadly drawn as to include virtually every possible system in which a multi-pressure discharge is supplied from a pump with an ejector attached, and which include virtually every possible means for dividing the input to the pump between a discharge outlet and the injector to assure an operating supply to the injector.

43.

Claims 1, 2, 4 to 8, 15 and 16 of patent No. 2,424,285 differ from claims 3, 9 to 14, 17 and 18 of said patent by including (in differently stated broad terms in each claim) as typically stated in claim 2 of said patent: "means within said assembly for dividing the input to said pump assembly between said discharge outlet and said injector nozzle to assure an operating supply to said injector assembly"; which function and result, as stated in Finding of Fact 12, were old in the art, and the addition thereof to said claims 1, 2, 4 to 8, 15 and 16 add nothing patentable to said claims, and said claims

are, therefore, invalid as not defining a patentable invention.

44.

The claims in suit Nos. 3, 9 to 14, 17 and 18 of patent No. 2,424,285 are so broad that they define no invention and are invalid.

45.

The claims in suit Nos. 3, 9 to 14, 17 and 18 of patent No. 2,424,285 do not define an invention over the prior art and are invalid for want of invention.

46.

The pumping systems claimed in the claims of patent No. 2,424,285 would be substantially duplicated without invention merely by connecting an injector to one of the high-pressure discharge connections of the old and well known multi-discharge centrifugal pumps such as shown in patents Nos. 704,144; 730,842; 2,248,312 and 1,494,595, Defendants' Exhibit Nos. O, P, Q and R.

47.

Patent in suit No. 2,424,285 fails to disclose and claim an invention patentable over the prior art and is, therefore, invalid for want of invention.

48.

The claims in suit Nos. 3, 9, 10, 12, 13, 14, 17 and 18 of patent No. 2,424,285 if valid have been infringed by defendants.

49.

Claim 11 of patent in suit No. 2,424,285 has not been infringed by defendants.

Conclusions of Law

1.

This Court has jurisdiction of the cause of action and of the parties.

2.

Patent No. 2,344,958 and each of the claims thereof are invalid and void in law.

3.

Patent No. 2,424,285 and each of the claims thereof are invalid and void in law.

4.

Defendants and defendant-counterclaimant are entitled to a judgment—

(a) dismissing the complaint;

(b) adjudging each of said Letters Patent Nos. 2,344,958 and 2,424,285 and each of the claims thereof to be invalid and void in law;

(c) enjoining the plaintiff, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, from threatening any of defendant-

counterclaimant's customers or dealers, or any present or prospective customers, sellers, dealers or users of defendant-counterclaimant's pumps, pumping systems and pumping apparatus, with infringement litigation because of their buying, selling or using defendant-counterclaimant's pumps, pumping systems or pumping apparatus, or advising or charging any of such customers, present or prospective, dealers or users, either verbally or in writing, with or notifying them of infringement of Letters Patent Nos. 2,344,958 and 2,424,285 if they should sell or offer for sale or use defendant-counterclaimant's pumps, pumping systems or apparatus;

(d) adjudging that defendants' and defendant-counterclaimant's be awarded their costs and disbursements herein.

Dated: March 17th, 1950.

/s/ LOUIS GOODMAN,
United States District Judge.

Lodged March 3, 1950.

[Endorsed]: Filed March 17, 1950.

In the United States District Court, Northern District of California, Southern Division.

No. 27905-G

JACUZZI BROS., INCORPORATED, a Corporation,
tion,

Plaintiff,

vs.

BERKELEY PUMP COMPANY, a Corporation,
BERKELEY PUMP COMPANY, a Partnership,
and FRED A. CARPENTER, LANA L. CARPENTER,
F. F. STADELHOFFER, ESTELLE E. STADELHOFFER,
JACK L. CHAMBERS, WYNNIE T. CHAMBERS,
CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG,
Partners Associated in business under the Fictitious Name and Style of
BERKELEY PUMP COMPANY,

Defendants.

JUDGMENT

This cause having come on to be heard upon the issues raised by the Complaint, Answer to Complaint and Counterclaim, and Answer to Counterclaim, and the Court having filed its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I.

That plaintiff, Jacuzzi Bros., Incorporated, is a

corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business at Richmond, County of Contra Costa, State of California.

II.

That defendant - counterclaimant, Berkeley Pump Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business at Berkeley, County of Alameda, State of California.

III.

That defendant, Berkeley Pump Company, was a partnership composed of the individual defendants Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynn timer T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, which partnership was dissolved under the date of August 1, 1946.

IV.

That this Court has jurisdiction of this cause.

V.

That this Court has jurisdiction of the plaintiff and of the defendants and the counterclaimant.

VI.

That plaintiff, Jacuzzi Bros., Incorporated, is the

owner of all the right, title and interest in, to and under the Letters Patent of the United States Nos. 2,344,958 and 2,424,285.

VII.

That Letters Patent No. 2,344,958, dated March 28, 1944, are invalid and void in law.

VIII.

That Letters Patent No. 2,424,285, dated July 22, 1947, are invalid and void in law.

IX.

That an injunction issue out of and under the seal of this Court enjoining the plaintiff, its associates, partners, attorneys, clerks, servants, agents, employees and confederates, and all in privity with them, and each of them, from threatening any of defendant-counterclaimant's customers or dealers, or any present or prospective customers, sellers, dealers or users of defendant-counterclaimant's pumps, pumping systems and pumping apparatus, with infringement litigation because of their buying, selling or using defendant-counterclaimant's pumps, pumping systems or pumping apparatus, or advising or charging any of such customers, present or prospective, dealers or users, either verbally or in writing, with or notifying them of infringement of Letters Patent Nos. 2,344,958 and 2,424,285 if they should sell or offer for sale or use defendant-counterclaimant's pumps, pumping systems or apparatus.

X.

That the Complaint of the plaintiff herein be and the same is hereby dismissed.

XI.

That defendants and counterclaimant herein shall recover against the plaintiff for their costs herein expended in the sum of.....Dollars (\$.....) and have execution therefor.

/s/ LOUIS GOODMAN,
United States District Judge.

Dated: March 17, 1950.

Lodged March 3, 1950.

Entered in civil docket March 20, 1950.

[Endorsed]: Filed March 17, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the plaintiff above named, Jacuzzi Bros., Incorporated, a corporation, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain decree and judgment entered in this action on the 20th day of March, 1950, and from each and every part of

said decree and judgment, except paragraphs I, II, III, IV, V and VI thereof.

Dated: April 11, 1950.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff and
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Notice is hereby given that the plaintiff and appellant, Jacuzzi Bros., Incorporated, does hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal in this cause:

1. All of the matters required by the provisions of subdivision (g) of Rule 75 of the Federal Rules of Civil Procedure.

2. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other ex-

hibits received in evidence, and all motions and applications made during the trial and rulings thereon.

3. Memorandum Decision of trial judge filed February 23, 1950.

4. Notice of Motion to Amend Findings, all proceedings had in connection therewith and rulings made thereon.

5. The complete record and all the proceedings and evidence in the action.

Dated: April 11, 1950.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff and
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 11, 1950.

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The motion of the plaintiff to amend the findings of fact and conclusions of law came on regularly to be heard this 11th day of April, 1950, and said motion was made pursuant to and in accordance

with the provision of subdivision (b) of Rule 52 of the Federal Rules of Civil Procedure, Messrs. Charles O. Bruce and Nathan G. Gray appearing for the plaintiff, and Messrs. Mellin, Hanscom & Hursh by Oscar A. Mellin appearing for the defendants; and said motion having been argued and submitted, and the attorneys for all of the parties consenting thereto, and good cause appearing therefor:

It Is Hereby Ordered that the findings of fact and conclusions of law heretofore made and filed in the above cause be, and the same are hereby, amended by adding thereto and incorporating therein the Memorandum Decision filed in this cause on the 23rd day of February, 1950.

Done in open court this 11th day of April, 1950, and it is hereby ordered that this order be filed as of said date.

/s/ LOUIS GOODMAN,

United States District Judge.

Approved as to form:

MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,

Attorneys for Defendants.

[Endorsed]: Filed April 12, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 27,905-G

Before: Hon. Louis E. Goodman,
Judge.

JACUZZI BROS., INC., a Corporation,
Plaintiff,
vs.

BERKELEY PUMP COMPANY, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT

Wednesday, May 11, 1949

Appearances:

For Plaintiff:

CHARLES O. BRUCE, ESQ.,
NATHAN G. GRAY, ESQ.

For Defendant:

MELLIN & HANSCOM,
OSCAR A. MELLIN, ESQ.,
JACK E. HURSH, ESQ.

The Clerk: Jacuzzi Bros. vs. Berkeley Pump
Company.

Mr. Mellin: Ready for the defendant.

Mr. Bruce: Ready for the plaintiff. [2*]

Opening Statement on Behalf of Plaintiff

* * *

The Court: You will have to tell me what you mean by an airplane engine and not pumps. It was only a matter of a few months. I don't wish any inference being drawn from that.

Mr. Bruce: I was not making an inference, except that Mr. Carpenter had worked there.

The Jacuzzi Bros. are now located in Richmond, out on the Bayshore Highway, close to El Cerrito, I would say. Now, I think we have some formal exhibits that we might get in at this time.

The Court: Well, you are going to offer patents, I suppose, into evidence?

Mr. Bruce: Yes, Your Honor.

The Court: That is all you have to show, so far as validity is concerned, on your opening case, isn't it?

Mr. Bruce: We will offer in evidence the two patents in suit; Patent No. 2,424,285 to Jack E. Piccardo and John E. Armstrong, as Exhibit 1.

(Whereupon Patent No. 2,424,285, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Bruce: As Exhibit No. 2—this is a printed copy of the patent, if Your Honor please—Patent No. 2,344,958, issued March 28, 1944, to John E. Armstrong and Jack E. Piccardo.

* Page numbering appearing at top of page of original certified Reporter's Transcript.

(Whereupon Patent No. 2,344,958, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 2.) [35]

* * *

Mr. Mellin: I have no objection to that, Your Honor.

Mr. Bruce: We will offer the photographic enlargement of Patents 285 as Plaintiff's Exhibit 3, and the photostatic colored enlargement of Patent No. 958 as Plaintiff's Exhibit 4. And, Mr. Mellin, may it be stipulated that we can refer to these patents by the last three numbers?

Mr. Mellin: I would prefer it, Your Honor. It will save a lot of time. [36]

The Court: Very well.

(Whereupon photographic enlargements of diagrams contained in Patents 2,424,285 and 2,344,958 were received in evidence and marked Plaintiff's Exhibits No. 3 and 4, respectively.)

Mr. Bruce: We will call Mr. Jacuzzi.

CANDIDO JACUZZI

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Candido Jacuzzi.

Direct Examination

By Mr. Bruce:

Q. Will you state your full name and residence, Mr. Jacuzzi?

(Testimony of Candido Jacuzzi)

A. Candido Jacuzzi, 1447 Eda Street, Berkeley.

Q. What is your age? A. 46.

Q. What is your business or occupation?

A. Our business is manufacturing pumps, and the occupation, my occupation is vice president and general manager of Jacuzzi Bros., Inc.

Q. Jacuzzi Bros., Inc.; the plaintiff in this action? A. Yes, sir.

Q. And how long have you occupied that position with the plaintiff corporation?

A. You mean vice president and general manager? [37]

Q. Yes, sir. A. Since '37.

Mr. Bruce: Mr. Mellin, will you stipulate to the incorporation of the corporation under the statute, the plaintiff?

Mr. Mellin: Surely. Whatever you say it is, I agree.

Q. (By Mr. Bruce): How long have you been engaged with said corporation?

A. Since 1919. However, from 1920 to '23 I was working elsewhere.

Q. Will you describe the work that you have performed in connection with the corporation?

A. During the early years we were in the manufacture of airplane propellers and airplanes. That is, the years between 1919 to 1930. And at the same time we were manufacturing pumps and water systems; that is, from the year 1925 on.

(Testimony of Candido Jacuzzi)

Q. What type of pumps and water systems did you manufacture?

A. Mostly of the injector type, most of our pumps are of the injector type.

Q. Now, what do you mean by an injector type pump?

A. Injector type—it is a pump that operates without the necessity of any working parts in the well. We supply an injector assembly, a pump unit or a pump system or a pressure system. It is two or three different methods in which to describe it.

Q. Would you refer to the drawings which you have had prepared and describe an injector pump system and pressure system for the [38] Court?

A. Surely. May I——

* * *

Afternoon Session, Wednesday, May 11, 1949

Mr. Bruce: At this time I would like to present a stipulation relative to the pumps manufactured by the Berkeley Pump Company. Those have been identified in exhibits to interrogatories, and probably it would simplify my record, Mr. Mellin. Would you stipulate that we might introduce in evidence photographic enlargements?

Mr. Mellin: I have no objection.

Mr. Bruce: I might do this and get rid of this part of it: We would introduce as Plaintiff's Exhibit No. 5 photographic enlargement of figure 36, representing a pump and pressure system as manufactured and sold by the defendants; and as Exhibit

(Testimony of Candido Jacuzzi)

No. 6, a photographic enlargement of Figure 36-A, representing a pressure system manufactured by the defendants; and as No. 7, photographic enlargement of Figure 71, representing a manufacture of the defendants; and as Exhibit No. 8, a photographic enlargement of a Berkeley Pump Company water system as manufactured and sold by defendants.

The Court: That has no figure?

Mr. Bruce: It has no figure. It is taken from a circular entitled "Gracious Country Living." And as, I think, of No. 9, a photographic enlargement of a pressure system designated Figure 37, Berkeley two-stage shallow well water system.

Mr. Mellin, you will stipulate that these exhibits 5 through [43] 9 are those that represent the pump systems covered by this stipulation?

Mr. Mellin: There is no question. I will do this, Your Honor. I do not remember what the stipulation is, but these are all pumps manufactured by the defendant. I would like to ask counsel through the Court at this time if each of these devices is charged to infringe either one or both of the patents in suit.

Mr. Bruce: That has been answered in the answers to interrogatories, Your Honor, and the answer is yes.

(The photographic enlargements referred to were thereupon marked, respectively, Plaintiff's Exhibits No. 5 to 9, inclusive, in evidence.)

Q. (By Mr. Bruce): Calling your attention,

(Testimony of Candido Jacuzzi)

Mr. Jacuzzi, to the pressure system illustrated in Figure 36 of Exhibit 5, will you describe the structure and mode of operation of the system there illustrated?

A. In the Exhibit 5, injector pressure system, we are taking water out of the low pressure discharge and also the high pressure discharge to operate the injector jet and lift water from the well to the centrifugal pump and repeat the cycle.

Q. How does that work in conjunction with the pressure tank?

A. With an automatic switch pressure tank, and, of course, this is what we call a free discharge. As a matter of fact, the valve shown in there is not required. It is not required for [44] the operation of the system. This system will operate without any mechanical devices to control the flow of water on the discharge of this pump.

Q. Marking in here, "1," what is that?

A. That is an injector assembly.

Q. Will you designate the first impeller?

A. This is the first impeller.

Q. We will mark that 2. Water discharges from the first impeller and goes where?

A. It goes either to a free discharge or into the second impeller.

Q. The second impeller we will mark 3. What is the pressure of the water delivered from the first impeller?

A. The amount of water, Mr. Bruce?

(Testimony of Candido Jacuzzi)

Q. No, relatively with respect to the rest of the system.

A. Well, the first impeller naturally is lower than the second impeller, which operates your injector.

Q. And the discharge of the second impeller leads to a discharge where?

A. Either to the injector, or there is a provision here to take water out at the high pressure.

Q. What is that provision that you mentioned?

A. An opening (indicating).

Q. We will call that 4. The greatest pressure is developed for operating what element of the system? [45] A. The injector.

Q. What becomes of the water which is delivered from the first impeller?

A. The water from the first impeller divides. It divides automatically; in other words, the amount of water for use for the water system is only that amount that is not needed for the second impeller to function the injector.

Q. In discharging to the pressure tank, it passes through a discharge pipe, and what is the element in the discharge pipe, which I mark 5?

A. That is a gate valve, generally used in case of repairing the pump in the field, assuming that we have a motor burned out or a worn out impeller because of sand, or a worn out injector. In that case we close valve No. 5 and we retain whatever water pressure we have in the tank for the household use, and this here represents a union that can be un-

(Testimony of Candido Jacuzzi)

coupled and break the pump away so it can be dismounted and repaired.

Q. What did you call 5? A. A gate valve.

Q. Does the gate valve have any function in the system when the system is in operation?

A. No, definitely not. It is not required in this system.

Q. So far as the operation of this system was concerned, that could be a straight pipe?

A. That is right. [46]

Q. Without the gate valve there at all?

A. That is right.

Q. Now, is the mode of operation of the Berkeley pump system as shown in Exhibit 5 and that of the Jacuzzi system shown in Exhibit 3 of patent 285, or the exhibit illustrated in the enlargement, Exhibit 3, similar?

* * *

Q. (By Mr. Bruce): You are familiar with the structure illustrated in Exhibit 5 of the patent 285?

A. This is Exhibit 5?

Q. Exhibit 3. A. This is?

Q. Yes, being Figure 1 of Patent 285.

A. I see.

Q. You are familiar with the structure there?

A. Definitely, yes.

Q. Has your company manufactured pump systems embodying the features shown in Exhibit 3?

A. Yes, sir. [48]

* * *

(Testimony of Candido Jacuzzi)

Q. (By Mr. Bruce): Mr. Jacuzzi, are you familiar with the mode of operation of the structure illustrated in Figure 1 of Exhibit 3?

A. Yes, sir.

Q. How long have you been familiar with it?

A. Oh, since 1941.

Q. State whether there is any similarity in the mode of operation [49] of the water system shown in Exhibit 3 and Exhibit 5? A. Yes.

Mr. Mellin: If Your Honor please, I think that calls for his conclusion. Is there any similiarity? If he was asked to point out the similarities and the differences, I would have no objection to it.

The Court: Are you asking that as a preliminary question?

Mr. Bruce: A preliminary question.

The Court: Are you going to follow it with a question——

Mr. Bruce: Yes.

The Court: If you are, I will overrule the objection.

Q. (By Mr. Bruce): Will you point out the similarity?

A. The similiarity is that in both systems, the system in Exhibit 3, we are taking water under pressure as we do in Exhibit 5, and to operate that injector as we do in Exhibit 3, operate that injector and supply water for a low pressure discharge as we do in Exhibit 5; and also in Exhibit 5 there is a provision marked "A," as we have in Exhibit 3, to take water out for any uses, such as a pressure sys-

(Testimony of Candido Jacuzzi)

tem use in this case, which would be on this here (indicating), or for irrigation, a pressure system used for either case; in other words, the openings provided in either pump are there for the purpose of making this system into this system.

Mr. Mellin: May I ask a question, Your Honor, just to clear the matter up? [50]

Q. Isn't the part marked A in Exhibit 5 a pipe plug and that is plugged up?

A. That is an opening.

Q. But it is plugged?

A. It is still an opening.

The Court: It is what?

A. It is there for a purpose.

Q. It is still an opening?

A. It has to be opened, as you defined. You may have a condition in the field that will require this opening; in other words, a condition of a farmer. Here we are only supply, say, 20 to 40 pounds pressure. That is not enough. Or 10 to 15 pounds pressure. That is not enough. We want a higher pressure. So what do we do? We take this plug out, connect our pressure on this side, and use this one for our open discharge, as we do in Figure 3.

Q. (By Mr. Mellin): But as shown in 5—I want an answer to this one question—as shown in 5-A, that is a plug?

A. It is an opening in terms of pumps, because in my connection of 25 years we always considered that an opening. It could be closed.

(Testimony of Candido Jacuzzi)

Q. May I have an answer to the question? It is closed on Exhibit 5 with a plug, isn't it?

A. It is an opening if the plug is removed. As I explained before, it is there for a purpose. [51]

The Court: I understand what your explanation is, Mr. Jacuzzi, but what the attorney wants you to say is the obvious, that in exhibit 5 there is a plug there. Of course, if you open it, it will be an opening, is that right? Irrespective of the reason for it——

A. In the picture it is a plug.

* * *

Q. Is there a water communication throughout the system of [52] Exhibit 3? A. Yes.

Q. So that is there the same communication throughout the system so far as Exhibit 5 is concerned? A. Yes.

Mr. Mellin: If Your Honor please, I object and move to strike that answer as calling for a conclusion. I think he has a right to show the two, instead of just the conclusion that it is the same. He is leading the witness and then asking for his conclusion at the same time, and we are not going to be able to get very far. I think the witness should point out the circuit of one and the circuit of the other, and then we will know.

The Court: I think you are moving a little too fast, Mr. Mellin. I think you have to give him a chance to ask a preliminary question; as long as

(Testimony of Candido Jacuzzi)

it is followed up by the detail of it, there is really no harm in that. It is not leading. The question calls for a yes or no answer. He answered yes. Now you can follow it. I will allow the answer to stand subject to a question that would call for a factual statement.

I will ask it:

Q. Point out the basis upon which there is the similarity.

A. Here we have equalization of pressure from the pressure system through each one of these impellers to the foot valve and to this discharge, which we have identically the same in here, equalization of pressure through these impeller into the [53] foot valve and into the system to this or any one of the discharges that are selected in the field.

Q. (By Mr. Bruce): Assuming you connect a pressure tank to the plugged opening 4 in Exhibit 5——

A. I said A before.

Q. It should have been 4.

Mr. Mellin: I think I misled you, Mr. Jacuzzi. I thought it was an A.

The Court: The record will show where the witness referred to A in Exhibit 5 he meant 4.

The Witness: 4. What was the question?

(The question was read as far as it had proceeded.)

Q. (By Mr. Bruce): ——and remove the pressure tank—Withdraw that. Would you have to

(Testimony of Candido Jacuzzi)

put anything in the discharge lines from 4 to the pressure tank?

A. It is necessary at this point that the pressure tank, as shown here, is removed completely and brought on this side, remove the plug and connect it on this side, and then it is required at that point that the control valve be installed between the high pressure discharge and the tank. As you will notice, Your Honor, these colors as they are here, the lighter the color the less the pressure. As the color darkens up, the pressure increases until, at the highest point, it is the darkest blue. There is necessarily a control valve to make the system operative, if the pressure tank is connected on this [54] side. Then, of course, when that goes off, you would have to have a plug on this opening here.

Q. Assume that you leave that open at that point——

A. You could.

Q. ——or connect it to a irrigation line.

A. This could be left open for irrigation purposes, in which case it may be necessary to adjust it so as to maintain sufficient water to operate the injector, to satisfy the injector on this line and satisfy the pressure system on this line. You see, we must have enough water for both, the pressure system and the injector. What is not required by those two openings, the pressure system and the injector, that water may be used for other purposes or for irrigation on this discharge here. The discharge could be, of course, any distance from the

(Testimony of Candido Jacuzzi)

pump. It could be 500 feet away or a thousand feet away, so that it is not necessary for the farmer or whoever uses the pump to come to the pump itself to open up a valve to start the system. It could be done with that valve 500 feet away by merely—a spigot or whatever you want to call it merely opened, because the entire system is what we call pressure equalization.

When the pump stops, the pressure tank no longer—I mean the pressure switch stops the pump, where we have enough pressure in the tank, and then we have what we call pressure equalization. The pressure is equal inside the tank as well as inside the pump or inside the pipe 500 feet away or inside the [55] pipe in the well. So to start the pump, the only thing you have to do is to open the discharge valve in the system or an irrigation discharge valve or spigot at whatever distance it may be, and once you do that, you open that valve, you release pressure from the tanks sufficiently—assuming your tank pressure is 20 to 40 pounds you release the pressure sufficiently so that your pressure switch will cut in and start your pump.

Q. Do you know of any other pressure system where you have that pressure equalization?

A. Do I know of any?

Q. Any other? A. Yes.

Q. —than the two there?

A. I am talking about ours and the Berkeley Pump Company. Those are the two.

(Testimony of Candido Jacuzzi)

Q. Those are the two?

A. That we know of.

Q. Is it customary to attach a pressure tank to the opening 4 on Exhibit 5?

A. Yes, very customary. It is very customary.

Q. (By Mr. Mellin): By Berkeley Pump?

A. By Berkeley Pump, by ourselves, by many of our dealers, distributors, because that is obvious to do it in the field as the requirements are needed. In other words, when pumps are ordered, they are sent out from the plant with instructions that [56] they can be used either from this discharge or other discharge, depending upon the conditions for which the pumps are sold.

Q. It is a matter of selection?

A. It is a matter of selection.

Mr. Bruce: Would you say that that was one of the reasons for the placing of that plug in the casting?

A. You mean plug No. 4?

Q. Of Exhibit 5.

A. Plug No. 4 on Figure 5?

Q. Yes.

A. It is obvious it is for that purpose.

Q. And that has been done, hasn't it?

A. Definitely.

Q. It has been done with the Berkeley system?

Mr. Mellin: Just a moment. It seems to me, Your Honor, we are getting a lot of testimony in here that may or may not be so. Here they are

(Testimony of Candido Jacuzzi)

showing this device infringes. Now they are hooking it up in a different way.

The Court: I think the objection is good. The witness, of course, can testify as to what he has seen done with a device of Berkeley Pump.

Q. (By Mr. Bruce): Have you seen the Berkeley Pump Company catalogues?

A. Yes, I seen it. I haven't studied it thoroughly.

Q. Have you seen such a connection illustrated in the Berkeley [57] Pump Company catalogues?

A. You mean as shown——

Q. No, with a pressure tank connected to the discharge 4 of figure 5.

A. Don't we have it here, Mr. Bruce? Yes.

Mr. Mellin: You are referring to Exhibit 9?

Mr. Bruce: Exhibit 9.

The Witness: That is right. You see the mode of operation here is the same. We have pressure equalization from the low pressure discharge to the high pressure intake. When the pump stops, that is, the pressure switch, we have enough pressure; and then when all this pressure here becomes equalized, by connecting a pipe——

Mr. Mellin: There is no pipe connection there.

The Witness: A pipe can be connected—is that better?

Mr. Mellin: All right, but there isn't any showing. We are doing a lot of assuming. I do not mean to interrupt, Your Honor, but they have all of our

(Testimony of Candido Jacuzzi)

pumps here, all of our setups, and if we go through them orderly one at a time without assuming a connection when there isn't any there, we will find out which infringes and which does not.

The Witness: If a pipe where this opening is, is provided here, which in the picture is a plug, if an opening is provided here in the field, it is obvious for a farmer with literature of instruction to remove this plug and install a piece of pipe [58] ten feet or ten hundred feet that he can draw water at low pressure from this shallow well system. He can draw water at low pressure without the necessity of coming to the system to open or close the valve, as would be required. In other words, the system will operate automatically whether the water is drawn ten feet or ten hundred feet. We have what we call the—in other words, the pressure equalization. There are no check valves, no valves in between the system that close this.

The Court: What you are saying is that on Figure 9 the tank is where No. 4 on Figure 5 is located?

A. Yes.

Q. The so-called plug which is on the righthand side of Figure 9, which counsel has marked No. 6, is where the tank with the valve 5 on it is located on Exhibit 5, is that right? It is just the reverse?

A. That is right.

Q. And you say the pressure system is such that you can do it either way?

A. It is obvious, Your Honor, because——

(Testimony of Candido Jacuzzi)

Q. Don't argue. Is that correct?

A. Yes.

Q. (By Mr. Bruce): Referring to Exhibit 6, Figure 36 A, will you explain the construction and mode of operation of the figure represented in that exhibit?

A. The construction and mode of operation of Figures 5 and 6 [59] are identically the same in every respect. The only exception is that Figure 5 is what we call a parallel pipe injector system. In other words, there are two pipes, one parallel to the other, that go down into the well, and we use that where we have large diameter wells. For small diameter wells, two inch, three inch and so forth, we use what we call a single pipe system, one pipe inside the other, or at times we use the well itself for the outside pipe. You see, over here they are identically in every respect, and from here down it is just a question of selecting which injector for which well, because the well may explain, one larger and one smaller.

Q. So far as the casting of the pump unit is the same, are they the same?

A. They are identically the same.

Q. And what you have said with respect to Exhibit 5, without the necessity of repeating it, you would say the same thing with respect to Exhibit 6?

A. Yes.

Q. In comparing the mode of operations of Exhibit 6 with that of Exhibit 3? A. Yes. [60]

(Testimony of Candido Jacuzzi)

Q. Now, I call your attention to Exhibit 7, Fig. 71, and will you describe or explain the construction and mode of operation of the pump unit shown there?

A. Exhibit 7, as to the casting, as far as the parts, we call this "bracket," "bottom." They are identically the same—"bracket," "bottom" indicating). What we have——

Q. Let us mark that so that we can get it. Which do you mean as the bracket?

A. This is the bracket and the bottom (indicating).

Q. In other words, this would be the bracket?

A. No.

Q. Well, you draw the line on there.

A. Right here, "bracket" and "bottom" (marking on diagram).

Q. All right. Mark those 7, the figure 7.

A. 7?

Q. 7. A. 7.

Q. 7 and 8. A. (Witness complied.)

Q. And will you mark the corresponding part of the casting on Exhibit 5, giving them the same numbers? A. 7, 8 (marking on diagram).

Q. All right. Now, continue with your explanation.

A. What we have here on Figure 7, we have what we call an intermediate stage, which is—in other words, this is No. 1 [61] stage, the lower stage, No. 2 and No. 3 (indicating). Here you have the

(Testimony of Candido Jacuzzi)

selection of three discharges. You can either take your water out of what we call the low pressure discharge——

Q. Which we will mark 9 (marking on diagram).

A. We can take out the water of the medium pressure discharge.

Q. Which we will mark 10 (marking on diagram).

A. Or we can take out the water at the maximum pressure discharge (indicating).

Q. Which we will mark 11 (marking on diagram).

A. So that as far as the mode of operation of the two systems, or the three or four systems, it is the same. It is just a question of selecting from which operation, or which opening, rather, you want to take your water; because you may find farmers that will require only 20 to 40 pounds pressure. Or another one requires, say, 30 to 50 pounds pressure. Or you might select the highest pressure for high pressure pumps, high pressure purposes, which at times are required in farms and other places.

Q. From what source is the water supplied to the first impeller?

A. From the first impeller it is supplied by the jet. In other words, from the highest pressure obtainable of the pump, we supply the water that operates the jet.

Q. Well, is the jet shown there?

A. No.

(Testimony of Candido Jacuzzi)

Q. Would you explain how that would be attached, or is it? [62]

A. How it would be attached?

Q. Yes.

A. It is very simple; the literature tells us how to do it. The other one, Mr. Bruce. That one wouldn't be——

Q. What have you done, for the purpose of the record, Mr. Jacuzzi?

A. Well, now, we have attached——

The Court: No, he wants to know what you have done. What have you done? You have put something on Exhibit 7. He wants you to tell us what you have done.

A. (Continuing): Well, what we have done, we have attached the injector assembly to the pump units.

Q. The same injector assembly as shown on Exhibit 5? A. Yes.

The Court: Now, you had better mark what you put on there in some way to identify it.

Mr. Bruce: Mark that Exhibit 7-A.

(Diagram of injector assembly attached to Exhibit 7, referred to above, was marked Plaintiff's Exhibit 7-A in evidence.)

Q. (By Mr. Bruce): Now, what is the purpose of the opening, 10?

A. What is the——

Q. The purpose of it.

(Testimony of Candido Jacuzzi)

A. To opening 10? [63]

Q. Of opening 10.

A. Well, opening 10, you can connect it, the same pressure system as we show here on 5. That can be connected into 10, and of course operating in that way, then you will no longer need any mechanical devices between the discharge of your pump to the tank, or any whatsoever to operate, for this system to operate. It will become hydraulically balanced so that it will not require any mechanical devices in any one of the discharges here (indicating). In other words, all you do is to prime the pump, throw the switch on, and it becomes operative. There is no valves of any kind needed.

Q. Now, would a pressure tank be connected to opening 9 of Exhibit 7, the same as shown in Exhibit 5?

A. Yes, it could. It is just a question of selecting the pressure that is desired.

Q. Now, so far as the sections of the casting which house the impeller is concerned, is there any difference in the casting of Exhibit 7 and Exhibit 5?

A. You mean as far as the impellers are concerned, Mr. Bruce?

Q. So far as the casting is concerned.

A. Well, as far as the pictures show, there is no difference on the impeller.

Q. Well, how many impellers have you?

A. Oh, system—some we have three impellers—on this one we have three impellers, on Figure 5 we have two. [64]

(Testimony of Candido Jacuzzi.)

Q. Now, what is done to the casting to accommodate the third, if anything—to accommodate the housing of the third impeller—to the casting or the middle impeller, we will say?

A. Well, you have an intermediate stage.

Q. You said an intermediate stage?

A. Yes.

Q. Well, in other words, the top of the casting which houses the second impeller in the series and houses the casting—the casting which houses the first impeller in the series—does that part of the casting remain the same as in Exhibit 5?

A. Identical.

Q. Then you simply add a section to the same housing inserted in between, for the housing of the third impeller?

A. That's right.

Q. In the series. The third impeller in the series?

A. That's right.

Q. Now, does the addition of a third impeller change the function or mode of operation of the system?

A. No, no; but the reason of the third impeller—in other words, the third impeller is not the limit. It could be four, five, or six, any number that you desire. Those are selected, the number of impellers are selected to be assembled in the pump, and in the pump unit or the stages, depending upon the water level or the pressure that you want to obtain. The [65] water level in the well. In other words, if we have a water level of a hundred 200, or 300 feet,

(Testimony of Candido Jacuzzi.)

it is required a lot of pressure, it is needed a lot of pressure to lift water up, and in that case we add impellers, as you see here in Fig. 3. And now in Fig. 3 we have——

Q. Exhibit 3.

A. I am sorry, Exhibit 3—we have one, two, three, four, five, six impellers, see? In cases like this is where we want a lot of pressure to operate a pressure system, and we need a lot of pressure to operate the injector or what we may call a deep lift, where the water is very deep.

Q. Now, is there any difference in the arrangement of the impellers in Figure 7 and in—Exhibit 7 and Exhibit 8?

A. Well, the only difference is that there are, instead of being one into the other, as we have here, we have here what we call “back-to-back,” you see. We come in from the first—did you say Exhibits 5 or 7?

Q. 7.

A. We come in here from the back, and that is done to balance, usually, the thrust or to relieve a certain amount of pressure into the packing, because when we lift water from great lifts, we have to have pumps with a lot of pressure, and usually too much pressure against the packing gland will give us trouble. So the design of putting it back-to-back is to relieve the pressure into the packing gland of the pump. [66]

(Testimony of Candido Jacuzzi.)

Q. And does that change affect the mode of operation? A. No, no, it would not.

Q. And is that the customary thing in the trade, to do? A. You mean to put it back-to-back?

Q. Oh, yes, or to arrange them one on top of the other? A. That's right.

Mr. Mellin: That is old, too? Did I get that answer right? You can arrange it either back-to-back or one on top of the other? That is all old? I didn't get your answer, Mr. Jacuzzi. Both are old?

The Witness: What was the question?

Mr. Bruce: He said it is customary practice.

Q. Now, then, the same similarities between Exhibits 3 and 7 exist as between Exhibits 3 and 5? Similarities of mode of operation, I mean?

A. Yes, sir.

Q. And what you have said with respect to Exhibit 5 would apply likewise to Exhibit 7?

A. Yes, sir.

Q. Now, then, I will call your attention to Exhibit 8. Will you explain the structure and mode of operation of the figure, of the pump pressure system, shown in Exhibit 8?

A. Here we have a dual-discharge pump, a low-pressure discharge for irrigation purposes, and the high pressure, the highest pressure from the impeller, producing the highest pressure, into [67] your pressure system. This low-pressure discharge, as I stated before——

Q. The low-pressure discharge?

(Testimony of Candido Jacuzzi.)

A. Yes.

Q. We will call that 12 (marking on diagram).

A. The low-pressure discharge, 12, can be at any distance from the well, and again in this particular case we have what we call "pressure equalization" from the point where you want to take the water to the pump system or pressure system. We have an open circuit so that the pressure equalizes when the pump becomes inoperative, so that when you open the valve, either 10 feet or 1000 feet, you cause the pressure, the water to come from the tank and feed your opening, because your pressure, it causes your pressure switch to start the pump, causing your—then as it is shown here, and also in this case it is a very simple question to——

The Court: I think the witness is getting into a discussion of the matter. Can't you get him to just answer the questions a little more directly.

Mr. Bruce: All right.

Q. Is there any difference between the casting of the pump unit in Exhibit 8 and Exhibit 5, 6 or 7?

Mr. Mellin: That is of the centrifugal pump, Mr. Bruce?

Mr. Bruce: I withdraw that. Not to include 7.

Q. But is there any difference in the casting of the pump unit [68] shown between Exhibit 6, 8 and 5?

A. No difference.

Q. Provided with the same number of opening?

(Testimony of Candido Jacuzzi.)

A. Exactly the same number of openings. You have another one there, Mr. Bruce.

Q. The same number of impeller stages?

A. Yes, sir.

Q. Present in Exhibit 8 as in the——

A. Let me see this one. Yes.

Q. As in Exhibits 5 and 6?

A. That's right.

Q. This system is designed for what kind of operation, as between deep or shallow well?

A. What was the question again? Which one, No. 8?

Q. Is this one designed for and adapted for a shallow well or a deep well operation, or both?

A. Both.

Q. Exactly as shown there, it is shown for what operation?

A. As it is shown here now, it only shows connected into the pressure tank and connected in to low pressure discharge.

Q. Well, is it for deep or shallow wells?

A. Both.

Q. Installations?

A. Both. It would be, it could be for either.

Q. It could be for either? [69]

A. Because here you have your opening or shallow well and here you have your opening for deep well. So by merely putting the injector on (attaching diagram to Exhibit 8), you have the same thing.

(Testimony of Candido Jacuzzi.)

Q. You have placed on Exhibit 8 an injector system, showing an injector system, the same as in——

A. An injector system assembly, which will be complete now, and make the pressure system.

Q. And that is the same as is shown in Exhibit 5? Your injector assembly which you have placed, attached to Exhibit 8, is the same as an injector system that is shown on Exhibit 5?

A. Yes, the injector assembly.

Mr. Bruce: We ask this be introduced and marked as Exhibit 8-A.

(Injector diagram attached to Exhibit 8, referred to above, was received in evidence and marked Plaintiff's Exhibit 8-A.) [70]

* * *

Q. (By Mr. Bruce): Now, I call your attention to Exhibit 9, Figure 37, and ask you to explain the structure and operation of the pump system there shown, or the pressure system there shown.

A. What we have here is a pressure system with two discharges, two discharge provisions. One is connected to the pressure tank and the other is available for low pressure, for irrigation, as I have explained it before, for other purposes. Then we have here that same thing applies. We have these openings that an injector can be applied to. Now, see here is the "Berkeley 2-stage shallow well water system."

(Testimony of Candido Jacuzzi.)

Q. You are reading from it?

A. Yes, I am reading from it.

The Court: Well, that explains itself.

The Witness: From the exhibit—— [74]

The Court: It explains itself, Mr. Bruce.

Mr. Bruce: It does.

The Witness: “Convertible deep well——”

The Court: You don’t need to read it.

Q. (By Mr. Bruce): Now, will you convert it as it states there to deep well pumping?

The Court: You are going to put a jet on it?

The Witness: We are going to put a jet on it. And we have a deep well pump (attaching diagram to diagram referred to).

Q. You are putting the same injector system on, or the injector assembly, that you have in Exhibit 5?

A. That’s right. You see, your Honor——

Q. And that converts that to a deep well system?

A. That’s right.

Q. Well, we will—withdraw that.

Mr. Bruce: We ask leave to have this admitted in evidence.

The Witness: May I——

The Court: You let Mr. Bruce do it. You know there is an old saying that no matter how smart an engineer or business man you are, when you try to be your own lawyer you have got a bad client.

The Witness: Well, I was only going to point out——

The Court: Well, let Mr. Bruce do it.

(Testimony of Candido Jacuzzi.)

The Witness: Okeh, I am sorry. [75]

The Clerk: Is that exhibit admitted?

The Court: That is 9-A.

(Jet assembly referred to above, attached to diagram 9, was received in evidence and marked Plaintiff's Exhibit 9-A.)

Q. (By Mr. Bruce): With the injector added, as shown in 9-A—a combination of Exhibits 9 and 9-A—does that function in the same manner as the—I will withdraw the question.

The Witness: Here it is, Mr. Bruce.

The Court: We will take a brief recess at this time.

(Recess.)

Mr. Bruce: May I have the last answer read, Mr. Reporter?

(Record read.)

Q. (By Mr. Bruce): Well, Mr. Jacuzzi, the pump system, or the water system of Exhibit 9 with 9-A attached, has the same mode of operation as the system of Exhibit 3? A. Yes.

Q. Now, Mr. Jacuzzi, in all of these pumps, all of these pump systems, the pump unit, with the exception of Figure 71 and Exhibit 7, employ the same casting, with the same openings?

A. Yes.

Q. Now, referring to Exhibit 4, which is, which represents Figure 1——

(Testimony of Candido Jacuzzi.)

The Court: Exhibit 1.

Mr. Bruce (Continuing): —Exhibit 4, and Figure 1, therefore, which is an enlargement of Figure 1 of the patent drawing, [76] will you describe the structure and mode of operation?

A. Yes. Here we have a pressure system with an injector assembly pump unit. What we have here is a multi-stage pump, which we provide pressure at a lower pressure discharge, medium pressure discharge, and an injector pressure discharge. You will note that on this pump we use all the water that is produced by the highest impeller to operate the injector. This could be one impeller, two, three, four or a dozen impellers above any one of these discharges, in order to create a very, very high pressure, a very high pressure being desirable and needed to lift water from wells where the water level is down, say, a hundred, two hundred, three hundred feet. And it is not desirable, that pressure is not desirable, for a home, because in that case we would have at this point the highest impeller, perhaps 200, 300 pounds pressure, and those pressures are above any limits of our plumbing fixtures in a home. At this point on this pumping system, pressure system, we select to take out the water at the discharge, we select a discharge to give us the pressure in the home that we want to. That pressure may be 20 to 40 pounds. And you will note that this system is self-balancing. At no one of these discharges, whether it is a discharge for ir-

(Testimony of Candido Jacuzzi.)

rigation or a discharge to the pressure tank, or our uppermost, high pressure discharge, to operate our injector, we do not need [77] any mechanical devices to control the flow of water. The flow of water is hydraulically balanced. In other words, what we mean by hydraulically balanced, it means that the water we take out of this pipe or this discharge, here (indicating), is an amount which is not needed for the operation of our injector at the highest pressure. Does that—

Q. When you say that no type of mechanical means is needed—

A. No type of mechanical device or means needed.

Q. What, specifically, do you refer to?

A. Well, any device that would restrict the openings, such as a valve or an automatic valve, or any kind of valve that may restrict these openings, either on discharge, 87, or on discharge here (indicating), 77. There is no valves of any kind needed. The system is, itself, balanced. That doesn't require any attention, once put in operation. It doesn't require any attention by the farmer, or whoever might be the owner of the pump, to watch it, because of receding water levels. It is understood, I am sure, that—

The Court: What you mean is that it hasn't got any mechanical valves, like 83 and 89, on No. 3?

The Witness: That is right, no valves are needed.

(Testimony of Candido Jacuzzi.)

The Court: Is that the only difference?

The Witness: That is one of the differences, yes.

The Court: Well, what other differences? What other mechanical thing is there that you are referring to, besides [78] 83 and 89?

The Witness: I am a little confused now.

The Court: Well, I am not trying to confuse you. I am just trying to find out whether or not the mechanical devices that you have referred to—what are they? There are those designated as 83 and 89 on Exhibit 3, and if there are any others besides that, what are they?

The Witness: Well, I think that is the only difference, your Honor.

Q. (By Mr. Bruce): What do you mean by “self-balancing”?

A. Well, self-balancing, what we mean by self-balancing, means that there is no adjustment—let’s put it that way—there is no adjustment needed in line 87. There is no adjustment needed in line 77. There is no adjustment needed in line—is that 62?

The Court: Yes.

A. (Continuing): I think it is, or 73. There are two numbers.

Q. (By Mr. Bruce): That is in the discharge from the—or, to the jet?

A. In other words, what we mean by adjustment, is to employ any kind of a control valve at any one of these openings, either to control the

(Testimony of Candido Jacuzzi.)

flow of water that would go out of line 87, or to control the flow of water that we take out from line 77, or control the flow of water that we use for the jet. The pump functions in such a way that that is not needed. It all [79] operates by itself.

Q. Now, does this type system possess any advantages from the point of view of installation or maintenance?

A. Definitely. Very much so. Because——

Q. State to the Court the advantages.

A. You see, now, we have here, we have a pump, and we take out from the upper or higher, the highest stage, the highest point of pressure, the water that supplies our jet. Now, on this point here, on 285, Exhibit 3, our water is divided at the highest pressure or part of the—the requirement to operate our injector, it sends down here——

The Court: But that isn't what he asked you.

The Witness: I am sorry, I wanted——

The Court: He wants to know what are the advantages in installation.

Q. (By Mr. Bruce): What advantages in the matter of installation and maintenance does this system have, a self-balancing system?

A. There is no adjustments necessary.

Q. In other words, there being no control valve or mechanical means for constricting?

A. That's right.

Q. Discharge pipes?

A. I was coming to that before, but I am sorry.

(Testimony of Candido Jacuzzi.)

Q. All right, will you state——

A. I was just coming to that point that here we have, we divide [80] our water, and it is necessary that we have a control valve, and what we mean by a control valve, we mean, that means choking the flow of water sufficiently to maintain the necessary volume and pressure to operate our injector. Because we must bring to our injector enough water and pressure to lift the water that we take from the well high enough within the reach of our centrifugal pump.

Q. And that adjustment, the adjustment of that control valve and the setting of it presents a real problem in the installation of the pump?

A. It has been presenting a real problem, especially within the last few years, because of this receding water level conditions that we have in the San Joaquin and Sacramento Valley. Every time that the water level recedes, it requires a new adjustment of the valve, whether it is a control valve or an automatic device to control the flow of the water to operate the injector. And that is something that does not require on pump Figure 1, Exhibit 4, patent 958—that is always self-adjusting, regardless of what the water level fluctuates in the well.

Q. Well, all the pressure in a system of this kind, which is—No, I withdraw the question.

This system, does it not take the full requirements for the operation of the injector and just take that which remains over as delivered to service? [81]

(Testimony of Candido Jacuzzi.)

A. You mean in Figure——

Q. No. A. Figure 1?

Q. No, I mean on Figure 4.

A. What is the question again?

Mr. Bruce: Would you read it, please?

(Record read.)

A. Yes.

Q. (By Mr. Bruce): Does it make a great deal of—does this system have any advantages so far as water levels in the field are concerned, or water levels in the well?

The Court: He just answered that.

The Witness: I answered that question, that it doesn't require any adjustment.

The Court: He says it has the advantage of not having to be adjusted according to the change of water level.

The Witness: There is no valve, there is no adjustment.

Q. (By Mr. Bruce): It is self-adjusting?

A. Self-adjusting.

Q. Now, will you state with respect, calling your attention to Exhibit 5, whether there is any similarity in the mode of operation of the water system shown in Exhibit 5 and Exhibit 4?

Mr. Mellin: If your Honor please, may I make my same objection to that as asking for the conclusion, unless it is a preliminary question to be followed up by precise showing [82] of the similarities?

(Testimony of Candido Jacuzzi.)

The Court: I assume that is what counsel is doing. You may move to strike it if it isn't.

He wants you to point out the similarity between 5 and 4, now. Is that right?

Mr. Bruce: Yes.

The Witness: Between 4 and 5, the similarity there is that in neither case is a control valve required, or any mechanical means to control the flow of water to operate—maybe I am confused here. Just a moment. That's right, see? The flow of water to operate our injector. The injector, there is no mechanical means or valve needed to operate the injector, which will take all the water produced by the second impeller to operate the jet. But the water that comes up from the well to the first impeller first satisfies the amount required by the second impeller to operate the jet, then the surplus water is available to use for pressure system or irrigation, in which case no control valve or any mechanical devices to restrict the flow of water is necessary.

Q. Then you would say that Figure 5, or Exhibit 5, was a self-balancing system?

A. Definitely.

Q. Now, calling your attention to Exhibit 4 on the discharge pipe 89, there is a mechanical contrivance—it looks like 91. Will you explain what that is and point it out [83] to his Honor?

A. 91, it is shown here, is a spigot or a sort of a valve. In other words, the same thing happens

(Testimony of Candido Jacuzzi.)

here that happened, or didn't happen, in the other—that is, we can take this pipe and extend it to any distance, 10 feet, 1000 feet, and it is self-balancing. That means that we have the same pressure in the tank here as we have throughout the system into our injector assembly and so forth. And into this pipe-line, a thousand feet away. So that by just opening that valve, we reduce the pressure in our pressure tank and cause the pressure to start down, and causes the pressure system, the injector system, to become operative again.

The Court: So to that extent it is a mechanical device, isn't it? I say, to that extent it is a mechanical device?

The Witness: This here?

The Court: 91.

The Witness: Well, it is a mechanical device only to the extent that when you want water, you open the valve.

The Court: Well, by that opening up, does that have any effect on the pressure?

The Witness: Well, where you want——

The Court: I see what you mean.

The Witness: Where you want to irrigate on this side, or you want to use it in the home, see, the water that is attached from the home is under pressure.

The Court: What you mean is that in contradistinction [84] to other mechanical devices, which are

(Testimony of Candido Jacuzzi.)

devices for regulating the size of the flow, this is not that kind?

The Witness: This is—this hasn't got any of those.

The Court: All right.

The Witness: And that applies to the same thing over here in Figure——

Q. (By Mr. Bruce): In other words, it is not a control valve?

A. It is not a control valve, no.

Mr. Bruce: Just one moment, your Honor.

(A conversation out of hearing of reporter.)

Q. (By Mr. Bruce): What you have to say, what you have said with respect to Exhibit 5, does that apply with like force to Exhibit 6?

A. Yes.

Q. And to Exhibit 7? A. Yes.

Q. Now, where you feed the jet or injector assembly from the same source that you take a supply of water, I understood you to say that it was always necessary to use some control?

A. Definitely. There is no other way that the pump can operate, because we have to have pressure on this line when the injector, when the discharge is connected to the highest pressure. It is necessary to have a control valve or a device to control the flow of water, because we have to restrict that flow of water in order to maintain the necessary pressure and volume to operate [85] our injector. You see, our injector here, the velocity of the nozzle must

(Testimony of Candido Jacuzzi.)

have sufficient power or push to lift your foot valve and bring additional water in and lift it within reach of the centrifugal pump, you see, because that is the only way you can keep the system in operation.

Q. Now, Exhibit 9, with 9-A attached——

A. Let's see if I can follow you.

Q. ——shows it is necessary to install a control valve?

A. Definitely, definitely. You must have a control valve.

Q. Is there a control valve shown there?

A. Now in terms of a control valve, that we know, that we use in the field to control the pressure, the system, there is no valve there that we call a control valve, like a control valve that is used to tamper with——

The Court: What is that?

The Reporter: To tamper with.

The Witness: It is very important.

The Court: I wish you wouldn't, Mr. Jacuzzi, make all these speeches. It is too difficult for me to follow. You get involved in long discussions of things. This isn't clear to me. I can't see why you need a control valve on No. 9 any more than on No. 5. What is the difference?

The Witness: Well, the difference is this, your Honor, that on No. 9 the water that we are talking about, that we are taking out to be used in our pressure tank, is taken out [86] at the highest pressure.

(Testimony of Candido Jacuzzi.)

Whereas in No. 5 the water that we are taking out for the tank is at the lowest pressure. And you will notice that the high pressure there is no—the high pressure, we feed the injector only, see? Over here at the high pressure we are taking out for the injector and at the same time for the pressure system.

The Court: Well, then, when you say that according to the design in 9 you do need a mechanical device—is that what you mean?

The Witness: Oh, definitely.

The Court: So in that respect it is not the same as Exhibit 4?

The Witness: It is the same as 3. [87]

Q. (By Mr. Bruce): But is the mechanical constriction there adequate for a control valve?

A. In terms of some people, no, because—do you want me to give you an explanation?

Q. What is this Venturi-shaped part which I will mark 13? What is the purpose of that system as shown?

A. That is used only when the pump is used as shallow well system, and that is——

Q. When it is used as a system such as is shown in Exhibit 9, without any injector assembly?

A. That's right. That is used to inject, to bring air, because the pressure provided by the centrifugal pump at the point when the pump starts is much greater at this point than it is on this side or in the tank. Therefore it creates this restriction here at

(Testimony of Candido Jacuzzi.)

that point of the velocity of water, water that goes through fast. And it creates a vacuum on this black line here, and it opens an air intake at this point and causes air to be brought in, to bring in air and feed our tank. Each tank, each water system, is necessary to have some kind of a device to pump in air, because the water itself, it will in time absorb all the air that we have in the tank and cause the tank to become water-logged.

Mr. Mellin: If your Honor please, may I move to strike that answer on the ground that it is not part of the controversy here and it is merely a part of the systems that have been known [88] for some 20 years.

The Court: Well, I don't quite get the relevancy of the answer.

Mr. Bruce: It is relevant——

The Court: Having a very poor mechanical mind, I cannot follow when these answers are so long and discursive; but it seems to me that there could be an answer that would be right on the nose, in the language of the street.

The Witness: It is almost——

Mr. Bruce: We will make it clear, if I may, for your Honor.

The Court: You might ask some specific questions that I can follow better.

Q. (By Mr. Bruce): Mr. Jacuzzi, referring to Exhibit 4, the discharge from the top impeller leads into a chamber, 62, which passes down to pipe 23?

(Testimony of Candido Jacuzzi.)

A. Correct.

Q. All the water discharged from the impeller at the top stage is directed towards the jet?

A. That's right.

Q. Is that right? A. That's right.

Q. Now, then, if you took away the plug out of the casting at the point of highest pressure and let the water, let the pressure go out there or discharge there, would you get enough water, enough pressure to operate the jet? [89] A. No.

Q. The only way that you could do that would be to have a mechanical constriction in here?

A. Correct.

Q. In the discharge passages as shown in Exhibit 3, that is, 59? A. That's right.

Q. So that you could control the amount of pressure going to the jet and also keep the pressure to the jet to the full requirement?

A. That's right.

Q. Opening the valve, 59, to draw off only that excess which was not needed to operate the jet?

A. That's correct.

The Court: Now, may I ask a question, if it won't interfere with your examination?

Mr. Bruce: Certainly.

The Court: The plan described in Exhibit 4 is not usable in the case of every type of installation of a pump? If you are going to use the pump, for example, and equipment in the manner described in Exhibit 9, you can't use it according to the method

(Testimony of Candido Jacuzzi.)

set forth in Exhibit 4, because there you have to have a mechanical means; is that right, or have I made myself clear? [90]

A. On 9 you have to have a control valve.

The Court: So that you can't make available this method as described in 4 in every case, can you?

A. No.

Q. Am I correct about that? You said a moment ago, Mr. Jacuzzi, that No. 4 was an improved method, because there you have got something that did not have to have any mechanical means of control, is that right?

A. That is right.

Q. But if you still use a pump such as you say the Berkeley people used, and as shown in Exhibit 9, you can't make use of that system; you have to have a mechanical device there?

A. On No. 9, yes, as we have on No. 3.

Q. (By Mr. Bruce): Perhaps if you would tell the Court, Mr. Jacuzzi, or describe how you install a pressure system and the adjustment of the control valve, it might clarify the matter to the Court.

The Court: How long is that going to take?

The Witness: I will make it very brief, your Honor.

Q. (By Mr. Bruce): Describe it with reference to Exhibit 3. That is a control valve.

A. The first thing to do——

Q. Make it brief, Mr. Jacuzzi.

A. I will make it brief.

(Testimony of Candido Jacuzzi.)

The Court: I do not mean to be unkind about that. [91]

Mr. Bruce: I think this question may clarify some things to your Honor.

The Witness: The first thing we do, we install an injector in the well with two lines of pipe coming clear up to the surface, and then what we do, we either screw the pipes into the pump by unions or flanges, and we connect our pressure tank into our pump and it discharges here, a lower pressure discharge. And then what we do, we fill up all these passages marked in blue—that is water that is filled up to this point of this valve. We close the valve. The valve is closed when the pump is primed. Then we start our water. The moment we start the water, the impellers turn around, and assuming the installation is made perfect then we get the maximum pressure—with the valve closed, we get the maximum pressure of the pressure gauge. At that point we adjust this valve. The moment we commence opening those valves a stream of water will flow out in the direction of the pressure tank, and at the same time in the direction of the injector. We open the valve until we have reached—until the pressure has dropped to the point that it is necessary to operate the injector. At that point we can see the pump is adjusted for operation, and we continue to flow a stream of water into the tank until we have a desired pressure in the tank, which can be 20 to 40 pounds, or greater or lower. At the same time if

(Testimony of Candido Jacuzzi.)

we want to select or desire a lower pressure of discharge, we have the discharge here, the [92] adjustment of this valve, and this valve substantially work together, we will say, because we must continue at all times a stream of water in the direction of our injector. It is necessary to lead the water from the well within reach of our centrifugal pump, which you will notice the intake is point 71.

Q. What happens when you open the valve too wide when you are making that adjustment?

A. The moment this valve is opened too wide, this is what happens: We do not have sufficient pressure in this line to operate our injector. In other words, there is not enough water and pressure coming down through this line and not through the nozzle to lift the water that comes in from the well, to lift it within reach of the pump.

The Court: You have gone over this before. There has been testimony on this before as to how that works. I got that part of it.

By Mr. Bruce: Just answer this yes or no.

Q. If you open it too wide will the pump lose its prime? A. The pump loses its prime.

The Court: For the reason there is too much water going into the tank, is that right?

A. Yes.

Mr. Mellin: May I ask one question, your Honor?

Q. And when you once adjust that valve, it stays that way until the well condition changes due to a drop in the pressure, you [93] do

(Testimony of Candido Jacuzzi.)

not have to change it any more for the same well conditions?

A. Occasionally it is necessary that readjustments be made.

Q. If the water table drops?

A. No, for several reasons. The water table has nothing to do—for such a reason as the valve, assuming we are pumping sand, abrasives, then a stream of water going through the valve has a tendency to wear out the valve or dig a bigger hole into the valve. That means a repeated adjustment because we have worn out a bigger hole through the valve.

Q. (By Mr. Bruce): All those adjustments are eliminated in the structure of Exhibit 4?

A. That is right.

The Court: Mr. Bruce, I have made an appointment at 4:30 today, so we will have to adjourn a little bit earlier and try to make up for it tomorrow.

(Thereupon an adjournment was taken until tomorrow, Thursday, May 12, 1949, at 10:00 o'clock a.m.) [94]

Thursday, May 12, 1949, 10:00 o'clock A.M.

The Clerk: Jacuzzi Bros. vs. Berkeley Pump Company.

Mr. Bruce: Ready.

Mr. Mellin: Ready.

Mr. Bruce: At this time, your Honor, I would like to read into the record the stipulation of the defendants and plaintiffs of January 20, 1949:

“It is hereby stipulated and agreed by and between plaintiff and defendants in the above-entitled action through their respective counsel that all of said defendants prior to the commencement of this action, and subsequent to the issuance of Letters Patent No. 2,344,958, here in suit, and that said defendant Berkeley Pump Company, a corporation, prior to the commencement of this action, and subsequent to the issuance of Letters Patent No. 2,424,285, also here in suit, within the Northern District of California, Southern Division, have or has made and sold to others pumps and pump systems in all respects like the pump and pump systems illustrated and described in Exhibits A, B, C, D, and E of Defendants’ interrogatories filed herein on or about the 25th day of June, 1948.”

Dated January 20, 1949, and signed by attorneys for the plaintiff and attorneys for the defendant. [95]

Mr. Mellin, you will stipulate, will you not, that the exhibits 5 through 9 are the pumps and pump systems or illustrations of the exhibits referred to, or enlargements of the exhibit referred to in the stipulation just read?

Mr. Mellin: They are the same minus the colors.

Mr. Bruce: Minus the colors. I just want to make one point to clear the record. We had no stipulation with respect to 9-A. I mean that is immaterial because those systems were also sold, to complete the matter, so there is no issue that we did not make and sell systems referred to in those exhibits.

CANDIDO JACUZZI

recalled as a witness on behalf of plaintiff; previously sworn.

Direct Examination
(Resumed)

By Mr. Bruce:

Q. Mr. Jacuzzi, I call your attention to Exhibit 4, which is Figure 1 of patent 958, and ask you if in your 25 years of experience, or at any time before the water system there illustrated was first manufactured by your company, had you ever seen or heard of a water system of the injector type in which the entire output of the highest stage of a multi-stage pump unit was used to supply the injector? A. No.

Q. Yesterday his Honor asked you whether the only difference between the two patents in suit was that in 958 you eliminated the control valve, your answer to which I believe was "Yes." [96] To the extent that you have just stated there is that additional difference?

A. Yes, the additional difference is that all the water from the highest pressure is directed to the injector.

Q. Do you wish to change your answer made yesterday to that extent? A. That is right.

Q. Was the fact that the delivery, this whole delivery of the highest stage of the pump to the injector, did that make possible the elimination of the control valve? A. Yes.

(Testimony of Candido Jacuzzi.)

Q. And in the elimination of that I believe you testified that that gave you a self-balancing system?

A. Yes.

Q. 100 per cent? A. 100 per cent.

Q. And in the installation of such a system, the installation was simplified? A. Definitely.

Q. All you had to do was to set the system in operation without any adjustments, whatsoever?

A. None whatsoever.

Mr. Bruce: Mr. Mellin, have you in court the original notice, the letter from Jacuzzi Brothers to the Berkeley Pump Company? [97]

Mr. Mellin: I do not have it, but we will stipulate that they gave us written notice, your Honor, so there is no issue there.

Mr. Mellin: We will offer in evidence the copy of letter of October 7, 1947, to Berkeley Pump Company, from C. Jacuzzi, General Manager of the plaintiff, and ask that that be marked Exhibit 10.

The Court: Very well.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Bruce: Your witness.

Cross-Examination

By Mr. Mellin:

Q. By the way, Mr. Jacuzzi, you are familiar with the earlier systems manufactured by your company, aren't you, earlier water systems?

(Testimony of Candido Jacuzzi.)

A. Yes.

Q. Pressure systems? A. Yes.

Q. And you are also familiar with the various patents that you have? A. Substantially.

Q. And you recall that prior to 1940 you produced a water system in which there was a low-pressure taken-off at what would correspond to the suction line from the jet into the centrifugal pump? [98]

A. What was the question again, Mr. Mellin?

Q. In one of those earlier systems or earlier patents you recall that the Jacuzzi Brothers showed a low-pressure discharge from the suction line which led from the jet into the intake of the centrifugal pump, do you not?

A. From the suction line, yes.

Q. That is the low-pressure discharge from the system?

A. That is the low-pressure discharge from the suction line.

Q. That water goes out of there under the influence of the suction of the centrifugal pump and under the influence of the pressure imparted to it by the jet? A. What is the question again?

(Question read.)

A. It goes out through the influence of the pump unit.

Q. And discharged? I mean it is pumped out. I am not trying to trick you, Mr. Jacuzzi. The Court would not allow me, in the first place.

(Testimony of Candido Jacuzzi.)

A. Give me a chance to think.

Q. I beg your pardon. I thought you did not understand.

A. It is discharged, yes.

Q. Did the Jacuzzi Company build such systems?

A. Yes.

Q. And in that system you also employed a jet, didn't you?

A. In that system we also employed an injector assembly.

Q. That is what I call a jet. [99]

A. We call this part an injector assembly.

Q. All right, we will call it an injector assembly. How is the water pumped back to that injector assembly, Mr. Jacuzzi?

A. The water to the injector assembly is pumped by the pump unit.

Q. The centrifugal pump unit?

A. The pump unit.

Q. That is under the influence of both the injector assembly and the centrifugal pump?

A. No, it is only under the influence—that the injector operates is only under the influence of the pump unit, because if it was not for the pump unit, the injector would not operate.

Q. All right. Then there is a higher pressure discharge from the pumping system down to the jet?

A. Yes.

Q. Therefore, all of the discharge of the higher

(Testimony of Candido Jacuzzi.)

pressure stages of the pump or stage, singular, went back to the ejector assembly, is that not so?

A. Not all of it.

Q. Where did the rest go?

A. I beg your pardon. You are talking about the early patent now?

Q. Whatever you are talking about, the one you built.

The Court: He wants to know whether you are referring to earlier systems. [100]

Mr. Mellin: That is right.

The Witness: The earlier system.

Q. (By Mr. Mellin): Yes.

A. The answer to that is no, not all the water was directed down to the injector. There was always made provision for water to come out through the discharge of the pump, so as to either operate a pressure system or for other purpose. My recollection is we never did install a pump, that all the water from the discharge of the pump was used to operate a jet.

Q. So then, as I understand it, you had a pressure tank system to the high-pressure outlet of the pumping system and a low-pressure discharge from the suction line, from the injector assembly, is that correct?

A. I didn't get the question. It is too long. Make it short.

(Question read.)

(Testimony of Candido Jacuzzi.)

By Mr. Mellin: I will reframe the question and divide it up.

Q. As I understand it, you had first a low-pressure discharge from the suction line to the pump, is that correct?

A. We had a suction discharge on the suction line of the pump.

Q. For discharge?

A. On the suction line of the system.

Q. For a low-pressure discharge?

A. For a low-pressure discharge, yes.

Q. And then you had a high-pressure discharge from the pump?

A. Then we had a high-pressure discharge at the same time on the system. [101]

Q. And that went to a pressure tank?

A. That went to a pressure tank.

Q. And then you had a jet assembly?

A. We had an injector assembly.

Q. And part of the water that came through the centrifugal pump went back to the jet assembly?

A. Yes.

Q. That was all prior to 1940, the system that you are speaking of?

A. Yes. However, I would like at this time to explain the operation of that system, if I may.

Q. You will have ample opportunity, Mr. Jacuzzi, but just answer the questions and your counsel will bring out that matter if I do not. I show you an enlarged drawing of what appears to be a pumping unit consisting of a centrifugal pump,

(Testimony of Candido Jacuzzi.)

it is so marked, and a jet pump, which is so marked, and which you call an injector assembly.

A. It is called an injector assembly.

Mr. Mellin: I will mark that drawing for identification as Defendant's Exhibit A.

(The drawing referred to was thereupon marked Defendant's Exhibit A for Identification.)

Q. (By Mr. Mellin): You are familiar with that system, so far as it is illustrated there, Mr. Jacuzzi? A. Substantially, yes. [102]

Q. And that was a system that, except for precise details of mechanical constructions, was built and used long prior to 1940? A. Yes.

Q. And the motor I will mark "Motor." That is correct, isn't it? A. Yes.

Q. On that system there was a pressure system, wasn't there, connected to the high-pressure discharge?

A. It was used with a high-pressure tank.

Q. I will draw the pressure tank in and mark that "pressure tank" and the valve that I designate, that would be a control valve? A. Correct.

Q. And there was also an automatic switch in those systems, was there not? A. Yes.

Q. Which I have indicated correctly?

A. No, you should have your wires from the switch to the motor.

Q. I beg your pardon.

(Testimony of Candido Jacuzzi.)

A. That is correct.

Q. When the pressure in this tank dropped, the motor went into operation, and the pump operated, isn't that correct? A. Yes.

Q. And at what pressure it started operating would depend upon the setting of the switch?

A. That is right. [103]

Q. And when the motor operated there was a circuit established from the jet up through the suction line into the first stage of the centrifugal pump, into the second, into the third, and then it would be divided, part of it going into the pressure tank and part of it down to the jet, isn't that correct? A. Yes, sir.

Q. That is substantially the system, and there was a take-off of the suction line, isn't that correct?

A. That is a system which we did occasionally take off a discharge on the suction line. Just a minute. I am twisted. The suction line is on this side.

Q. You actually took it off after the jet, didn't you? A. That is right, I was confused.

Q. Do I draw this correctly when I draw it in? Is that correct the way I have it drawn with pencil and cross hatched, approximately?

A. That is not the low-pressure discharge. It is the suction line discharge.

Q. But it is a low-pressure discharge?

A. It is a suction line discharge.

Q. It is at low pressure, though?

(Testimony of Candido Jacuzzi.)

A. On the suction pipe, yes.

Q. So there you had the water from the jet pump or ejector assembly, part of it going out of this discharge, which I marked "B" and part of it going into the first stage of [104] the centrifugal pump, is that correct?

A. The question again, please?

(Question read.)

A. I don't understand the question. It is not clear to me. I am sorry.

Q. I'm awfully sorry. I will try to make it so. In the operation of the pump, when the pump is in operation, water comes up and under the influence of the jet, comes up and part of it discharges through the discharge B?

A. Well, the injector has no influence of itself, unless it is operated by the pump unit. In other words, the pump, with the impellers 1, 2, and 3, is what makes the injector function. The injector, by itself, will not operate without the aid of the pump unit.

Q. Let us start that again. Water is pumped from the highest stage of the centrifugal pump down to operate the jet, is that correct?

A. That is correct.

Q. And then as the water comes up to enter the centrifugal pump, some of that water under low pressure is discharged at B, is that correct?

A. Through the influence of the pumping unit on the surface, yes.

(Testimony of Candido Jacuzzi.)

Q. And some of the water is then discharged at B at low pressure? A. I said yes.

Q. And some of the water is divided after it leaves the last [105] stage, part of it going into the pressure tank and the remainder going down to operate the jet?

A. If I have the question, correct. I hope I had it right.

Q. I think you have, Mr. Jacuzzi. So that prior to 1940 that pumping system was in use as we have described it? A. Yes.

Q. What would be the difference, Mr. Jacuzzi, if in the event that you moved B up to the first stage of the operation of the pump other than a raise in pressure of the water?

A. That is where it makes a lot of difference.

Q. That is a difference I want to know.

A. When we take water from the first or second stage, it will never lose the prime of the pump. If we take water out of here through the suction line, what we have to do, the lifting of the water will have to be done entirely by the injector. In other words, the water at high pressure over here has to have sufficient water, or check down this valve and have sufficient water here to raise the other water that comes in from the well, not within the reach of our centrifugal pump, which is 20 or 25 feet away, but practically to the first impeller of the pump unit. However, when we put the discharge stage on the pump unit, then we utilized the ability

(Testimony of Candido Jacuzzi.)

of the pump, that is, the suction end of the pump to raise the water this 20 or 25 feet, because if we were to do it in this particular case, we are creating at this point what we call a sub-atmospheric [106] condition, you see——

Q. It would be sub-atmospheric——

A. Excuse me. May I finish?

Mr. Gray: Let him finish his answer.

Q. (By Mr. Mellin): Go ahead. I was trying to shorten it, counsel.

A. You create a sub-atmospheric condition at this point, and that, with fluctuation of the water level in the well, it will cause air to enter at that point. The moment you cause a sub-atmospheric condition air will enter and it will enter through the impellers and cause the pump to lose its prime. That is something that will not happen when you use the discharge of the first or second stage.

Q. However, the net result would be, other than that, that this first stage take-off would be at a higher pressure than would be taken off at B; that is correct, isn't it?

A. Not necessarily.

Q. As a matter of fact, Mr. Jacuzzi, the jet characteristic can be changed by determination of the jet pressure to raise the water directly into the centrifugal pump; is that not so?

A. It is not practical. It has never been done. In fact, when we discovered this system in our patents, to take the water out of the first, second or third stages, whatever the case may be, this sys-

(Testimony of Candido Jacuzzi.)

tem was no longer used, because it is inefficient. You see, this system here will not give you the performance, and [107] is apt to give you a lot of trouble because it needs a lot of attention, you see. It is done that way for purposes: If you want to clear a well out of sand. But it is not practical. In fact, we do not use it any more.

Q. As a matter of fact, Mr. Jacuzzi, isn't it a fact that under certain well conditions, including depth, when you want to irrigate, isn't a system such as shown in A, with the addition of B, the the most efficient for that purpose?

A. The question again?

Q. For a particular purpose? Strike it out. I will reword it. Taking a system precisely as shown in A, as we have been discussing, with a low-pressure discharge at B, for some well conditions, isn't that the most efficient and more efficient operation than if you took it off of one of the stages of the pump? A. No.

Q. And isn't it a fact also that under other well conditions it is more efficient to take it off the second stage than it is the first stage?

A. The question again?

Q. Isn't it more efficient in a system of this kind under certain well conditions and the head to which you are pumping, to take it off the second stage than the first stage? A. You see——

Q. Can you answer the question "Yes" or "No" and then explain? [108]

(Testimony of Candido Jacuzzi.)

A. No. You see, your question is confusing. What we do when we take water out from the first or second stage, we are changing the mode of operation of the entire pumping unit. It no longer operates as it shows in here, because all the water here is brought to the surface or to the highest impeller and then divided to operate an injector for a pressure system, but in this case over here we do not, you see. Only the water that we use here at low pressure is taken out at this point, and that water is not brought up through these impellers at a high pressure with wasting of the power—in other words, to operate the injector pressure system.

Q. You did not quite get my question, Mr. Jacuzzi. I asked you isn't it a fact that under different well conditions and different service requirements the pump may operate more efficiently at, let us say, in Exhibit 3 with the low pressure discharge, say at the fourth impeller or at the fourth stage, rather than the second?

A. More efficiently?

Q. Yes, under certain conditions.

A. You mean we operate more efficiently at this point than it would at this point?

Q. Under certain conditions, yes, the whole system.

A. Depending on what purpose you wanted to use it.

Q. That is correct. Different circumstances make

(Testimony of Candido Jacuzzi.)

the pump more efficient at different stages of take-off? [109]

A. I think that is right. However, in this case, we are changing the mode of operation. The mode of operation is no longer as shown in your Figure 8.

Q. I understand what you say is a change of mode of operation, but when you change the low pressure discharge in Figure 3 from the second to the third stage, you do not change the mode of operation, do you?

A. What was that question?

Q. When you change the low-pressure discharge from the second stage to the third stage, you do not change your mode of operation, do you?

A. Yes.

Q. That is still a different mode of operation, is that correct?

A. That changes the mode of operation, because instead of taking it out at this point, we are bringing it up higher.

Q. The only difference is that you get a different pressure of the low pressure discharge?

A. You mean you are getting a different pressure once you are bringing it up here on an upper stage.

Q. That is right, you get a higher pressure on the upper one?

A. Higher pressure.

Q. So you can select the pressure of the low-pressure discharge at any one from the first to the last stage?

A. Yes. [110]

(Testimony of Candido Jacuzzi.)

Q. And when you make those changes, you do not change the mode of operation of the system, do you? A. Yes.

Q. You do. Each one is a change in mode of operation of the system? A. Yes.

Q. Referring back again to Exhibit A, there is in effect four pumps in that system, isn't there?

A. No.

Q. How many are there? A. One.

Q. Just one pump? A. One pumping unit.

Q. I am not talking about unit.

A. One injector assembly — you see, this is a pump, what we refer to as a pump. It is a pump unit at the surface, connected by means of this connector connecting the impellers all together. This is an injector assembly. In order to have this injector to function——

Q. We understand how it functions. I am not asking that. I am only asking the simple question, is this one pump? Is a multiple-stage pump considered strictly as one pump? A. Yes.

Q. How about Exhibit 3? Is that one pump, or more than one pump? [111]

A. It is one pump unit.

Q. Let us confine ourselves to the centrifugal pump. Is that one pump, or more than one pump?

(Testimony of Candido Jacuzzi.)

A. You mean the assembly?

Q. Yes.

A. It is a centrifugal pump.

Q. Is it one pump, or are there as many pumps as there are stages?

A. It is a centrifugal pump of the multi-stage type.

Q. Let us get the answer precisely. Wouldn't you say each stage is a pump in itself?

A. No, not in the sense of the word as it is in here, because a stage by itself, Mr. Mellin——

Q. Pardon me. Just a minute.

A. A stage by itself, Mr. Mellin, will not operate unless it is made into a pump, because we can take any one of these stages put the castings on each side, and it is not a pump.

Q. You have in a sense a case for each stage, haven't you?

A. No, we have a by-pass between one stage and another.

Q. So you would say, then, in patent 285 there is not a low pressure pump and a high-pressure pump?

A. There is a low-pressure discharge and a high-pressure discharge.

Q. I would like you to answer this question precisely: Is there a low-pressure pump and a high-pressure pump shown in [112] Figure 3 in Exhibit 3 of patent 285?

(Testimony of Candido Jacuzzi.)

A. This is a——

Q. Would you answer the question directly? I have a real reason for asking it, and then you may explain.

(Question read.)

A. No.

Q. Then if the patent, itself, in 285 calls that a centrifugal pump comprising a low-pressure pump and a high-pressure pump, to that extent it is in error, isn't it?

A. I couldn't say. I don't know anything about patents.

Q. You just testified——

A. You see——

Q. Just a minute, Mr. Jacuzzi. You just testified that that does not show a low-pressure and a high-pressure pump. If the patent says it does show a low-pressure and a high-pressure pump, to that extent the patent is wrong?

Mr. Gray: Just a minute. To which we object on the ground it is argumentative. The patent speaks for itself.

The Court: I think that is right. The patent speaks for itself.

Q. (By Mr. Mellin): Is the injector assembly not a jet pump and so known in the industry?

A. The injector, itself, is not considered a pump, because in order to make an injector operate, you have to have hydraulic pressure. What we mean

(Testimony of Candido Jacuzzi.)

by "hydraulic pressure" is water. It is not operated — in other words, you can use city water pressure or pressure from a fall in the mountains to operate an injector. In this case we are operating an injector by reason of a centrifugal pump unit at the surface. You cannot consider the centrifugal pump, in itself, because if you stop the pump unit on the surface, the injector would no longer function.

Q. I appreciate that, and if you did not have a motor on the centrifugal pump, it would not work, either?

A. That is right, but the centrifugal pump is what operates the injector.

Q. I understand that, but you have heard of injector assemblies in common parlance of the trade called a jet pump. That is what it is known as, is it not?

A. What we call a jet pump, we mean a jet pump (indicating). You see, there are two combinations here, jet and a pump. The jet is the part that is in the bottom of the well. The pump is the part that is at the surface. So we call it a jet-pump.

Mr. Mellin: I would like to offer in evidence Exhibit A to illustrate the witness' testimony.

The Court: So ordered.

(Defendant's Exhibit A For Identification was thereupon received in evidence.)

Q. (By Mr. Mellin): Let us take the system

(Testimony of Candido Jacuzzi.)

shown in Exhibit A, as we have modified it in pencil. The minute that the [114] motor stops operating, the pressure in the whole system equalizes, doesn't it, Mr. Jacuzzi? A. Yes.

Q. When you draw water off of the system, when you draw water from the system out of B, that lowers the pressure in the tank, doesn't it? You can draw water out of B without the pump being in operation, can't you?

A. Which was the question?

Q. I will put it again. I am sorry. I do not mean to confuse you. A. I know.

Q. Assuming the pump is not in operation and the tank is full, if you open the discharge B there will be a flow of water from the pressure tank through the control valve, through the centrifugal pump, and out at B, wouldn't there?

A. Can I have the question again?

(Question read.)

A. Yes.

Q. So that you would get an equalization of pressure in the system by opening the discharge B?

A. Yes.

Q. Just precisely as you spoke of equalization of pressure in the other system yesterday?

A. No.

Q. Tell us the difference. [115]

A. The difference is in this system, here we ob-

(Testimony of Candido Jacuzzi.)

tain the pressure equalization through an intermediate discharge stage of the pump unit, not through a discharge between the injector and the pump unit in the suction pipe, as you have illustrated there on Exhibit A.

Q. But in both instances you equalize the pressure in the system?

A. I would say so.

Q. In that one, in Exhibit 3, you equalize it through an intermediate stage, an intermediate or low-pressure discharge, and here you equalize it through a discharge in the suction? A. Yes.

Q. So that if this pipe from B were laid a thousand feet away, as you described yesterday, and you opened the valve, there would be immediate equalization of pressure through the system?

A. As I described yesterday. I described a thousand feet away from the system.

Q. I understand that.

A. However, it is not practical, and with that system the efficiency of the pump at this point is considerably less than at the point of discharge, at the upper stage, whereas in this other case the point of efficiency is more.

Q. I am talking solely about equalization, Mr. Jacuzzi. A. I answered that question.

Q. What? [116]

A. I answered that question.

(Testimony of Candido Jacuzzi.)

Q. I am afraid you did not. You answered it in your way. Let us answer it in mine. If you have a pipe connected to the discharge B, and you open the valve, the pressure in the system from the tank will equalize in the whole system?

A. I have never seen pumps installed that way. I guess it will equalize. It is not practical, as I stated before, to install pumps taking the water out for irrigation through a discharge that will give you less water than through a discharge that will give you more water.

Q. Let us take your system. Would it be practical when the motor is not in operation to take the low-pressure water, to take water from the tank down through the pump and out through the low-pressure discharge for irrigation?

A. Through here?

Q. Yes, when the motor is not in operation.

A. Yes, the moment you open the faucet or the spigot, the valve or whatever it may be, you cause the pump to start.

Q. But not until the pressure in the tank is lowered beyond the lower limit the switch is set at, is that right? A. That is right.

Q. Let us take Exhibit 3. Yesterday I think we were a little bit confused. You said when you opened the valve on the line 8 in Exhibit 3 the pressure in the system immediately equalized; is that true? [117]

(Testimony of Candido Jacuzzi.)

Mr. Bruce: That is objected to.

The Witness: It is equalized——

Mr. Bruce: That is objected to because that is not the testimony.

Mr. Mellin: I am asking him.

A. No, it was not.

Q. (By Mr. Mellin): Is it true or is it not true?

A. Give me the question again.

Q. As I understood your testimony, and correct me if I am wrong, I understood you to say yesterday that when you opened the valve 83 in line 81, that is the low-pressure discharge, fluid would flow from the tank 58 back through the pump and equalize the fluid pressure in the whole system?

A. It is equalized at the point where the pump is not running. That is my point — when the pump is not running.

Q. When the pump is not running?

A. When the whole pressure system is at a standstill, then pressure equalization occurs. However, the moment you open this valve, then you are releasing the pressure. You are releasing the pressure over the whole system.

Q. That is correct.

A. Until you are bringing the pressure down to 20 pounds, or whatever it may be, and your pump will start.

Q. That is correct, but first, if the switch is set for 20 pounds to start, and you have 40 pounds in the tank 58, and you [118] open valve 83, there will

(Testimony of Candido Jacuzzi.)

be a flow of water toward the tank 58 and out through the low-pressure system for a period of time until the pressure in the tank gets to 20 pounds, at which time the motor will start?

A. That is right.

Q. Wouldn't that be precisely true of the system shown in Exhibit A as we have drawn it in pencil?

A. No, you see in Exhibit A we are taking the water from the suction pipe of the pipe and not from an intermediate stage, so here you have a different cycle of the water. [118a]

The water will have to come back through all the stages, through the suction pipe and then through the discharge, so we do not have the same cycle of operation that we have over there.

Q. Over there that water has to come down one, two, three, four, five stages before it reaches the low pressure discharges: it is only a matter of how far it has to go?

A. No, no. Here we have a different system. You see, here it is coming through a suction pipe.

Q. I understand.

A. This is the suction pipe.

Q. Yes, it is full of water at all times, isn't it?

A. The suction pipe as well as everything else.

Q. And the pump.

A. Over there we are not taking the water out through the suction pipe.

Q. I understand that.

(Testimony of Candido Jacuzzi.)

A. We are taking it out through an intermediate stage.

Q. All right. Except for taking it out through an intermediate stage, and taking it out from the suction, there is the same direction of flow of water to equalize the pressure in the system in both, isn't there? Let me go back over that. In A, when the water from the pressure tank will flow through the control valve, through the three stages and down through the suction inlet of the centrifugal pump—

A. Down to the suction pipe. [119]

Q. Down to B. A. Yes.

Q. And then it will discharge, won't it? It will discharge through B if B is open?

A. I assume so.

Q. The minute the pressure in the tank comes below the limit set by the switch, the motor will start again, won't it? A. That is right.

Q. And operate the pump. In Exhibit 3, if you open the valve 83, there will be a flow from the tank 58 down through the first, second, third, fourth and fifth stages and out through the low pressure pipe 81, until the pressure in the tank is reduced to the poundage set by the switch, and then the motor will go into operation?

A. That is true, but there are two modes of operation.

Q. All right, the difference is one comes out of

(Testimony of Candido Jacuzzi.)

an intermediate stage, and in this one it comes out of the suction pipe. That is the difference?

A. That is one of the differences.

Q. Did you have any experience with ordinary centrifugal pumps during your pumping experience?

A. I consider it quite a bit.

Q. You, of course, have known of ordinary centrifugal pumps in which they have a discharge from an early stage and discharge from the final stage?

A. What was the question?

Q. You have during your experience seen ordinary multi-stage centrifugal pumps in which there was a discharge from an early stage in the pump and then another discharge from the final stage of the pump?

A. No.

Q. You have never seen such a pump?

A. Never seen one.

Q. Speaking of yesterday, you were referring to Exhibit 4, which is the drawing of Patent 958; you stated that no mechanical devices were necessary in the intermediate discharge of the pump. Did you have in mind anything other than a control valve?

A. Well, any devices of any kind that are not needed. You see, the system is so balanced hydraulically, you no longer need the necessity of any control valve or other mechanical devices employed to do the same thing.

(Testimony of Candido Jacuzzi.)

Q. The purpose of these control valves and other mechanical devices is to create a back pressure in the pump, isn't it?

A. What is the question again?

(Question read.)

A. Yes, on an injector pump perhaps of this type here.

Q. For the purpose of illustration, let us take Exhibit 9, which has a restricted throat, which you have marked 13, and because you have restricted the diameter of that throat you have to build up considerable pressure in the pump before it goes [121] into the tank; that is, you slow it down. You retard the flow to the tank, is that correct?

A. Yes. The purpose of this is, as the practical literature states, as an air aspirator, as we call it; however, the restriction could be designed to operate instead of a control valve. That is why I used the word yesterday "or other mechanical devices."

Q. In other words, you want to offer resistance to the fluid going out of the pump.

A. That is right. You have got to adjust the flow of water necessary to operate your injector so that at all times you have enough pressure there to lift the water within the reach of your centrifugal pump.

Q. So that is the reason for control valve or restriction is to offer resistance to the water discharging from the pump so as to build up a pressure?

(Testimony of Candido Jacuzzi.)

A. Yes.

Q. Does it make any difference as to how you build up that resistance, whether you do it by a control valve or some other medium?

A. The most practical way I know of is a control valve or a mechanical device especially designed for a given installation.

Q. Let us take Exhibit 6. You said that that had no control valves or other mechanical devices to resist the discharge of water through the low pressure connection. Did I understand you [122] correctly?

A. I didn't understand you.

(Question read.)

A. That is right.

Q. By the way, Exhibit 6 shows the low pressure connected to a pressure tank, doesn't it?

A. Yes.

Q. When pressure is built up in that tank, that will offer resistance, won't it, to the flow of fluid from the low pressure discharge into the tank?

A. What will offer resistance?

Q. I beg your pardon?

A. What would offer—

Q. Pressure in the tank. You are pumping against that pressure, aren't you?

A. Pumping against the pressure in the tank?

The Court: You are pumping against the pressure in the tank, aren't you?

A. Well, naturally.

(Testimony of Candido Jacuzzi.)

Q. (By Mr. Mellin): So that would offer a resistance, wouldn't it?

A. As an enclosed tank, yes.

Q. That is what they usually are. So the higher the pressure in the pressure tank, the greater the resistance to the discharge of fluid, isn't that correct?

A. Yes.

Q. So actually there is a medium in Exhibit 6 for exhausting the flow of fluid out of the pressure system, isn't that correct?

A. Yes, but it is not needed.

Q. I am not asking whether it is needed or not; I am asking you if it is there.

A. I am telling you it is not needed.

Q. You are saying it is not needed, Mr. Jacuzzi. Let us disconnect the tank in Exhibit 6. Remove the valve and this plug. Then you would have atmospheric pressure in this chamber, which I mark "chamber." Then you would have atmospheric pressure in that chamber, wouldn't you?

A. Only to that section above your impeller, or I would say to that section here (indicating). Let me explain it, please.

Q. I did not mean to interrupt you.

A. You have atmospheric pressure only at this point substantially.

Q. May I draw a dotted line?

A. Please. So that we continue here a flow, the intake of our impeller. We continue our flow of

(Testimony of Candido Jacuzzi.)

water into the intake to meet the requirements of that impeller to operate our jet. It always flows in there. The surplus water that we lift from the well then is discharged freely, whether you take this union, this valve, this tank or anything along that line.

Q. Then you would have, as I understand you, in the same [124] chamber, you can have two different fluid pressures, disregarding the difference in the hydrostatic head; you mean, you can have one pressure at A, which would be atmospheric, and a higher pressure at B? A. No the same.

Q. Then I didn't understand you correct.

A. The same pressure.

Q. It is the same pressure and that would be atmospheric?

A. No—well, substantially.

Q. Let us say substantially atmospheric pressure.

A. If this does not offer resistance, then you have substantial atmospheric pressure.

Q. If you remove the valve and the connection to the casting——

A. You would have water coming out while the pump is in operation, yes.

Q. And there would be no resistance?

A. Well, whatever resistance you have on the opening.

Q. Just that resistance. Then you would have substantially atmospheric pressure in there wouldn't you?

(Testimony of Candido Jacuzzi.)

A. No, you have the resistance of the flow.

Q. Does it make any difference how you provide that resistance whether by the design of the diameter of that opening or by some adjustable opening other than a practical reason?

A. May I have that question again?

(Question read.) [125]

Mr. Mellin: Strike the question.

Q. Wouldn't that offer the same kind of resistance to the flow out of the diameter of the opening as is offered by the opening through a control valve? Isn't it the same in kind of resistance?

A. No.

Q. It is different in kind? A. Yes.

Q. Tell me the difference.

A. In this particular case, you do not need a control valve.

Q. You are not answering the question.

A. On a conventional type or this type over here, you do need a control valve.

Q. I understand.

A. This is the one that operates without a control valve, and you may disconnect, as we have discussed over there, you may disconnect the opening here, 87, and the pump will still operate.

Mr. Mellin: May I move to strike the answer, Your Honor, as unresponsive?

The Witness: I think it is responsive.

(Testimony of Candido Jacuzzi.)

Mr. Mellin: I asked him if the type of restriction offered by a control valve was the same type of resistance offered by a small opening in the casting, and he answered how the other devices worked, and I think it is completely unresponsive. [126]

The Court: It may go out.

Q. (By Mr. Mellin): A control valve essentially always has an opening through it, doesn't it?

A. It could be closed.

Q. I mean in operation it has to have an opening through it?

A. If you want to pump any water through it you must have an opening.

Q. So in the control valve, what you actually do is to vary the effective area through which the water can pass; isn't that what it does?

A. The question again?

(Question read.)

A. No, the control valve is used for the adjustment, so that we maintain at that point the necessary head of pressure to operate our jet.

Q. In other words, it is some medium for making the diameter of the opening, which I am now marking with an arrow and marking X, to vary the diameter of the opening, which I marked X, that would be the functioning of a control valve, wouldn't it?

A. To reduce the diameter of the discharge at the high pressure given by your multi-stage pump, to

(Testimony of Candido Jacuzzi.)

operate so that you maintain sufficient water volume pressure to operate an injector.

Q. Let us get back to the question. The purpose of a control valve——

The Court: Why do you have to elaborate on that, Mr. Mellin? [127] That is obvious to me. The trouble is the witness always wants to argue about the application of the matter to this case. Of course, everybody knows that that is what a control valve is for.

Mr. Mellin: All right, Your Honor.

Q. Would you say, then, that the resistance in the pressure tank in Exhibit 6 wouldn't be effective to raise the pressure in the chamber of the pump there shown above atmospheric?

A. You mean the pressure inside the tank?

Q. Yes.

A. As we are pumping in the tank, whether or not it will increase the pressure at your first discharge stage?

Q. Yes. A. Yes.

Q. Yesterday in referring to Exhibits 4 and 3, which are drawings of the patents in suit, you testified particularly with reference to 958 in Exhibit 4, that no mechanical devices were necessary in that system to restrict the flow through the pipe of discharge 81 or the discharge 89, is that correct?

A. I said that no mechanical device is needed, that the system is hydraulically balanced in itself and does not need it. However, I could elaborate.

(Testimony of Candido Jacuzzi.)

Q. You do not have to.

A. As the pump pumps into the pressure tank, the pressure is raised. [128]

Q. And that creates a back pressure?

A. And you are creating a back pressure but not a restriction.

Q. Not a restriction?

A. No, but a back pressure.

Q. You create a back pressure, which is the purpose of the control valve?

A. You are creating a back pressure and not a restriction.

Q. In both patents in suit, the one reason you do not have to have a restriction or any back pressure, as I understand it, is for the reason that at the stage of the impeller, at which you take off low pressure, you so mechanically construct that stage that you positively divide the water between the low pressure outlet and that which is directed to the next higher stage, isn't that correct?

A. I will have to get that question again.

(Question read.)

A. The stage is built in such a way as to discharge the water at a higher point substantially than the intake of the preceding impeller, so as to maintain a flow. It doesn't supply it, in other words.

Q. (By Mr. Mellin): I hand you Exhibits 1 and 2, and I call your attention to Figure 2 of Pa-

(Testimony of Candido Jacuzzi.)

tent 958, and I call your attention to Figure 3 of 285, which figures, by the way, are identical, and ask you if that does not show a mechanical structure for discharging part of the water to the low pressure discharge [129] and part of the water to the intake of the next succeeding stage in the pump.

A. You are getting me into patents now.

Q. No, I am referring you to the drawings.

A. I am not a draftsman myself. I am a practical man in the field.

Q. I do not intend to talk about patents.

A. You are asking me to explain drawings that I do not thoroughly understand.

Q. Let us disregard the drawings. You were glib yesterday in your understanding of the operation of the pump.

Mr. Gray: If your Honor please, I move to strike the remarks of counsel as argumentative.

The Court: They may go out.

Q. (By Mr. Mellin): Isn't it a fact, Mr. Jacuzzi, that in the pumps shown in Exhibits 3 and 4, which are Patents 958 and 285, that at the stage which discharges the low pressure, it is so mechanically constructed that part of the water is positively directed to the discharge and part of the water is positively directed to the intake of the next stage?

A. No it is not a fact. It is not so constructed. The stage that we take the water out is constructed inside identically the same as any other stage pre-

(Testimony of Candido Jacuzzi.)

ceeding or underneath. We have added to that stage a discharge so the water can be drawn off at that point. We have discovered that water can be drawn off at [130] that point without starving the preceding impellers above. We can draw water at this point without starving the impellers to supply and operate the injector and pressure system. That is a discovery we have made.

Q. Then it is your testimony that in the patent in suit there is no mechanical means for dividing the water, that is, mechanical means in the low pressure stage from which you are going to discharge—for dividing the water, diverting positively part of it through the low pressure discharge and positively diverting the other part to the intake of the succeeding stage?

A. I do not know what you mean.

(Question read.)

A. The question is not clear to me, Mr. Mellin.

Q. (By Mr. Mellin): I will refer you precisely to Exhibit 4 and precisely to Exhibit 3 and I will point to the stage of the centrifugal pump, which is in alignment with the low pressure discharge 75. You understand that. Is there any mechanical means built in that stage which positively divides the water so that part of it must go to 75 and part of it must go to the intake of the next succeeding stage in the pump?

A. Yes.

Q. There is?

A. We have here what we call a bypass. In

(Testimony of Candido Jacuzzi.)

other words, the water comes out through this impeller. Part of it finds its way through the guide veins into the succeeding impeller, so that [131] we have the necessary amount of water to operate our injector and pressure system. Part of it, that we do not need for that purpose, is available for your low pressure discharge.

Q. Isn't the construction of the vein, that stage of the pump which is associated with the discharge 75, differently constructed than any of the other stages of the pump in Exhibit 3?

A. Only to the extent of the discharge opening.

Q. No other change?

A. Not that I know of.

Mr. Mellin: Your Honor, I am going to move to strike all the testimony of this witness pertaining to these two patents on the ground it is very evident from the patent itself that the witness does not know how the patent structure operates.

The Witness: I——

Mr. Mellin: Just a moment. I am arguing to the Court, Mr. Jacuzzi.

The Witness: I am sorry.

Mr. Mellin: I will show to the Court there is not only a drawing in the exhibit and each of these patents that shows a mechanical division of the water at that stage, and that stage is particularly and especially constructed to divide the water between the low pressure discharge and the suction of the next stage—the patent not only shows that,

(Testimony of Candido Jacuzzi.)

but provides if it does not have it, it will not operate.

The Court: Mr. Mellin, isn't that what the witness in [132] effect said?

Mr. Mellin: No, he said all stages were alike, and they are not alike. They can't be alike.

The Court: Does that amount to anything more than going to the weight of the testimony of the witness?

Mr. Mellin: I will withdraw the matter, if that is the way Your Honor might consider it.

The Court: It is very difficult on the strength of one answer that a witness makes to strike out all of his testimony on an argumentative basis, for a reason that does not pertain to the admissibility of the testimony. You can't strike out the testimony of a witness because he may say something different from what somebody else says or some other document shows. All that you create there is a conflict which the Court has to resolve on the considerations that have to do with the weight of the testimony. You can't strike it out unless it is because the witness is not qualified, unless it develops the witness is not qualified to give testimony, or it is inadmissible for some other reason.

Mr. Mellin: My point was, Your Honor, that he testified that he understood the construction and operation of the two patented pumps extremely well, and speaking for the patents and comparing other devices——

(Testimony of Candido Jacuzzi.)

The Court: Of course, these matters are really matters that have to do with the explanation of the patents in suit. [133]

Mr. Mellin: That is right.

The Court: It might have a bearing, I suppose, on the matter of infringement.

Mr. Mellin: It would go strictly to his qualifications to compare the alleged infringing structures with the patents in suit.

The Court: Only to the extent that it bears upon the weight of his testimony.

Mr. Mellin: I think perhaps Your Honor is right. We will withdraw it.

The Court: We will take a brief recess at this time.

(Recess.) [134]

The Witness: Before we proceed, I would like to make a correction.

The Court: The witness says he wants to correct something.

Mr. Mellin: That is all right.

The Witness: On my statement of this pressure equalization. When I was questioned, when he questioned me on that, he was building up the system as we were going along, and I had in mind a system we have been using for years, in which a check valve is between the pump and the pressure tank. Therefore it wouldn't be pressure equalization on Frank Jacuzzi's.

(Testimony of Candido Jacuzzi.)

Q. (By Mr. Mellin): But without the check valve, the equalization would be as we discussed it; without that check valve the pressure equalization would be as we discussed it? A. Yes.

Q. All right. Now, referring again to Exhibit 3, 285, and assuming that I understood your testimony that each of the centrifugal stages were identically alike and each of ordinary centrifugal pump construction, would that device function as you have previously described it here?

A. You mean that water can be drawn from the lower stage?

Q. Yes, the stages are so constructed that whether you take it out from one or the other, it would function? In other words, all of the stages, if all of the stages are alike and ordinary centrifugal pump practice is employed in the design of the impellers and the casing for the impellers, the pump, such as in [135] 285, would function as you have heretofore described it to the Court?

A. I don't quite get you, Mr. Mellin.

Mr. Mellin: Would you read it to him?

(Record read.)

A. What do you mean by "centrifugal pump practice?"

Q. Ordinary standard centrifugal pump design.

A. I still don't understand the question.

Q. Do you know what a standard centrifugal pump design is?

(Testimony of Candido Jacuzzi.)

A. Well, there is many different ways of making centrifugal pumps.

Q. Well, let's take any one of them that is standard.

The Court: Well, the trouble with that kind of question is, you ask him if it is as he has described it, and that is so broad that it may present difficulties.

Mr. Mellin: I understand, Judge. May I go at it another way, Your Honor?

The Court: Very well.

Q. (By Mr. Mellin): All of the stages of the centrifugal pump portion of the system shown in 285 are of the same construction and design, is that correct? A. Yes, sir.

Q. And if that is true, then the pump operates just as you have described it without any special construction of any one stage?

A. That's right, other than to provide the selective opening, [136] selective stages.

Q. You mean selective openings—that is, nozzle 75 and the takeoff at the high pressure discharge?

A. I didn't understand that.

Q. You talked about selective openings. You mean by that—— A. Where is nozzle 75?

Q. The low pressure takeoff, 75, and the high pressure takeoff, through valve 59 or 57; that is what you meant by selective openings, isn't it?

And by the way, the construction of the various stages of the pump in both patents, 285 and 958 are the same, are they not? A. Yes.

(Testimony of Candido Jacuzzi.)

Mr. Mellin: By the way, I have no answer to the last question. Would you read it?

The Reporter: "The low pressure takeoff, 75, and the high pressure takeoff, through valve 59 or 57; that is what you meant by selective openings, isn't it?"

Q. (By Mr. Mellin): Selective openings?

A. Yes.

Q. Now, you have examined the defendant's various pumps which you have testified to?

A. Yes.

Q. And there is nothing extraordinary—I mean, the runner design is more or less conventional, isn't it?

A. I would say so, yes. [137]

Q. And the design of the casing is conventional?

A. What do you mean by conventional? Do you mean by that—

Q. Well, ordinary volute type.

A. You mean this is the same as this and this is the same as that (indicating)?

Q. No, let's confine ourselves just to the centrifugal parts. The runners are more or less conventional in design, each of them, taken separately?

A. I was looking at the picture—looking at it, I would say so.

Q. And the chamber in which they operate, taken separately—they are each of conventional design?

A. I would say so.

Q. Now, the structural difference between the pump shown in 958, Exhibit 4, and 285, Exhibit 3, is that in 958 the discharge is at the next to highest stage?

A. It shows there, yes.

(Testimony of Candido Jacuzzi.)

Q. Whereas in Exhibit 3 it is at the highest stage?

A. Yes. However, in this case here, of 958, and we can put as many stages as required for different conditions.

Q. I appreciate that.

A. To meet different conditions.

Q. Yes. In other words, if you took the connection, plugged the nozzle 57 in Exhibit 3 and made the connection at the next to the last stage indicated by numeral 39 on Exhibit 3, instead of at the last stage, then you would have what is shown in 958?

A. Yes.

Mr. Bruce: Will you read that last to me, please? I didn't hear it very well.

(Previous question read.)

The Witness: Will you read it again for me?

The Reporter: "Q. Yes. In other words, if you took the connection, plugged the nozzle"—

The Witness: Nozzle? Is that what you meant?

(Indicating on diagram.)

Q. (By Mr. Mellin): Nozzle or discharge opening. A. From the discharge opening——

Q. 57. A. 57.

Q. Now, Mr. Jacuzzi, I would like to call your attention to Exhibit 9, and as illustrated there, there isn't any jet, is there, or ejector assembly? Is that correct?

A. The openings for the jet or injector assembly are available if you want to put an injector on.

(Testimony of Candido Jacuzzi.)

Q. I understand that, but I am going to take this system precisely as shown, as illustrated, with the plugs in the openings just as illustrated. You understand that Berkeley Pump sells that unit just as it is, without any modifications? You understand that?

A. Yes, I understand that.

Q. All right. Now let's confine ourselves to just what is [139] shown. Now, just what is shown there? Isn't that precisely the same in mode of operation as water pressure systems that have been built for, well, at least 20 years, except in particular details of design? I mean, as far as the mode of operation is concerned?

A. As far as the mode of operation, as it is shown here, assuming that this opening is not there, and this opening is not there, it is old, very old?

Q. Very old? A. Yes.

Q. In other words, I want that assumption the openings are plugged. Those are plugs shown?

A. No, those plugs, that is an opening there that can be plugged.

Q. And the drawing shows the opening plugged?

A. The drawing shows the opening plugged, yes, but it also tells you how to do it, to convert it to a deep well pump.

Q. All right. But with the openings, 6 and the opening 6-A, plugged as shown, the structure shown in Exhibit 9 is at least 15 years old, isn't it, if not older?

(Testimony of Candido Jacuzzi.)

A. With the exception of the openings, yes.

Q. Yes. Well, I have to get an answer.

Mr. Bruce: I think you got one.

Mr. Gray: He said, "Yes, with the exception of the openings."

Mr. Mellin: All right, no openings. [140]

Mr. Gray: Well, we will stipulate that the plugs are in on the picture.

The Witness: The plug is there because there is an opening. That is the reason the plug is there.

Q. (By Mr. Mellin): All right. Now, let's—

A. However, I would say that if the pump was made, perhaps like this (indicating), with a solid casting there, that the plug wouldn't be there.

Q. (By Mr. Mellin): All right, that's kind of arguing a difference between a bump and a lump, isn't it?

A. No, that is not argument.

(Conversation among counsel out of hearing of Reporter.)

Q. (By Mr. Mellin): Now, I have added to Exhibit 9 Exhibit 9-A which adds the jet.

A. That is the injector assembly, yes.

Q. And the opening which is plugged, and No. 6, and it remains plugged for the purpose of my question—there is no opening there, it is closed. Now, taking it precisely that way, isn't that structure in mode of operation extremely old?

A. What was the question again, Mr. Mellin?

(Testimony of Candido Jacuzzi.)

Mr. Mellin: He will read it for you.

(Question read.)

A. If the opening wasn't there, I would say yes.

Q. So when the plug is in, it is extremely old?

A. No, because the opening is still there. You see, I can't [141] concede an opening when it is plugged. I mean, I can see there is not an opening there, but it is plugged.

The Court: Well, let's not waste time on this. You are arguing over inconsequential matters. I can see that. I don't have to have that gone into.

Mr. Mellin: Yes.

Q. So that even when you add the jet, it was old, taking your assumptions?

A. If that opening was there, I would say so.

Q. Yes. Now, in both instances, when we say extremely old, we mean it was produced prior to 1940?

A. What do you mean, in both instances?

Q. Well, I mean, where I have left the jet on and where I have put the jet on. All other assumptions remaining the same. Let's see if I can put it more concisely, Mr. Jacuzzi.

As I understand your testimony, assuming that the openings are plugged——

A. No, I never said that. I said that the opening is still there even though it is plugged. It is available. The plug is there always for the purpose. It is available to take out the discharge, the low pressure discharge at any time you want to.

(Testimony of Candido Jacuzzi.)

The Court: Yes, I understand all that, Mr. Jacuzzi, but can't you answer this so we can get through with this? Forget about the fact that you can take the plug out. When it is in, and it is a closed area, then it is an old device if it is operated [142] that way?

The Witness: Your Honor, yes, if it is built this way (indicating).

The Court: Well, I understand. The trouble is that the witness wants to argue the case all the time, and I know what the point is. I am neither hard of hearing or so mentally defective that I can't get what you are arguing about. But if the opening is closed and the pump is operated with a completely closed surface there, then it is the same in manner of operation as was in effect in the old days?

The Witness: Yes.

The Court: All right. Now, go ahead, counsel.

Q. (By Mr. Mellin): Both with and without the jet?

(No response.)

Mr. Mellin: I withdraw it.

The Court: Well, it is obvious.

Mr. Mellin: Yes.

The Court: So far as physical fact is concerned, it is obvious. I am not attempting to indicate what the legal effect of what you are talking about is, but the physical fact is very obvious.

(Testimony of Candido Jacuzzi.)

Q. (By Mr. Mellin): I would like to call your attention to Exhibit 7 with the Exhibit 7-A attached, and I would like to ask you one question, and in that I am going to make an assumption that the plug from the intermediate stage is removed and the pipe [143] connection connected to it. Do you understand what I mean? Now I am going to your opening. A. Take it easy.

Q. All right.

Mr. Gray: Mr. Mellin, would you mention the number of the intermediate stage, so that there won't be any confusion? They are all numbered.

Q. (By Mr. Mellin): Which is the intermediate stage, Mr. Jacuzzi? A. No. 10.

Mr. Gray: That refers to the plug, I guess.

Mr. Mellin: No. 10 is the intermediate.

The Witness: This is the first stage, No. 9; No. 10 is the second stage, and the third stage is your——

Q. (By Mr. Mellin): I will mark the second stage. Have I marked it correctly? A. Yes.

Q. Now, if you remove the plug 10 and connect that to a discharge line, would the pump operate efficiently under normal circumstances without a back pressure resistance in that discharge?

A. It will operate.

Q. Will it operate sufficiently efficiently that you can use it commercially?

A. I never investigated the efficiency of the Berkeley pumps. But it will operate. [144]

Q. It would operate? A. Yes, sir.

(Testimony of Candido Jacuzzi.)

Q. Under all pumping conditions?

A. Well, also assuming that this is open, Mr. Mellin.

Q. Yes, that is shown open. It will operate under all pumping conditions without a control valve or the equivalent of a control valve?

A. Well, all pumping conditions—you are taking in a lot of territory.

Q. Under what conditions wouldn't it operate?

A. As I stated before, I am not familiar with the Berkeley pumps. I never did check the efficiency of the Berkeley pumps, of the control of water they pump under different openings, whether it is this opening or opening 10 or opening 9.

Q. So it is, as a matter of fact—withdraw that.

As a matter of fact, you don't know whether it would operate sufficiently efficiently to be commercial or not?

A. I don't—I am not familiar with the Berkeley pump to that extent.

Q. All right. Now, as shown in Exhibit 7, there is a low pressure discharge at 9, is that correct?

A. Yes.

Q. And it does not have a second discharge shown either at 10 or 11?

A. No, but there is a provision, of course, there. [145]

Q. Yes, all right. So that in that respect it does not include two discharges at stages below the last stage, does it, as shown in Exhibit 4?

The Court: Mr. Mellin, isn't that argumenta-

(Testimony of Candido Jacuzzi.)

tive? There seems to be no necessity of any testimony of this kind or arguing with the witness about it. Can't that be presented by argument of counsel?

Mr. Mellin: I think probably it could.

The Court: That is what I referred to yesterday.

Mr. Mellin: I know you did, Your Honor.

The Court: All you do is to get into an argument with the witness. And when you go into that phase of the matter, I have never found it to be of any help to me at all, because I would much rather hear what the lawyers who are skilled in these matters have to say about it, than to listen to the argument about it between the lawyer on one side and the witness on the other side, as to the meaning of these things, because they are after all perfectly argumentative in their nature.

Mr. Mellin: Well, the only reason at all I went into it, Your Honor, was that yesterday he went into a very great detail about the mode of operation of these as compared with the mode of operation of that and I just wanted to point out that while he says they are both the same, cross-examination proved them different. But I am perfectly willing to argue the matter later, Your Honor. [146]

Q. Just one question, Mr. Jacuzzi. I am going to ask your opinion, if you don't mind, and with the indulgence of the Court. With an ordinary centrifugal—Strike the question.

That is all.

(Testimony of Candido Jacuzzi.)

Mr. Gray: May we have a recess at this time, if Your Honor please?

The Court: You mean until this afternoon?

Mr. Gray: Yes. [147]

* * *

Mr. Mellin: If Your Honor please, one of our contentions is that there is a different mode of operation, and I would like to suggest that they make out their case, because they haven't shown that yet.

Mr. Gray: Well, then, that being the case, if Your Honor please, I think we would like to call Mr. Armstrong, the chief engineer for Jacuzzi Bros. He can testify very briefly on the subject.

Mr. Mellin: How long will it take? I have a witness, as I told the Court yesterday, who is on the other side of the Bay and——

The Court: Well, you are not prepared to put Mr. Armstrong on now?

Mr. Gray: Well, we would like to, inasmuch as it is only five minutes to go, to have the recess if we could. But I make this suggestion to counsel: I think if you had your witness here around 3:00 o'clock at the recess, that would be pretty close to the time.

The Court: Well, we will start in at a quarter of two and that will give you time to get your man and perhaps you had [148] better have your witness here then so he can go on this afternoon after this witness is finished.

Mr. Mellin: All right, Your Honor.

(Testimony of Candido Jacuzzi.)

The Court: We will recess until a quarter of two. [148-A]

Afternoon Session, May 12, 1949

Mr. Mellin: If the Court please, may I have the court's permission to ask Mr. Jacuzzi one more question?

The Court: Very well.

CANDIDO JACUZZI

recalled; previously sworn.

Cross-Examination

(Resumed)

By Mr. Mellin:

Q. Mr. Jacuzzi, just one more question. Referring to the diagram or drawing A, the only thing that is necessary to convert that system as now drawn on the diagram to the pumping system of 285 is to move the discharge that I have labeled B from the suction pipe to one of the intermediate stages for discharge, one of the intermediate stages of the centrifugal pump?

A. I didn't get the question.

Mr. Mellin: I will go over it.

Q. The only thing that is necessary to convert the pumping system as drawn on Exhibit A——

A. You mean with the pressure tank, the pressure switch, the control valve?

Q. Yes, the motor, the centrifugal pump, the injector assembly, and to convert that to the as-

(Testimony of Candido Jacuzzi.)

sembly, or to the system, of 285, would be to move the discharge outlet B from the suction pipe [149] as shown on A up to either the first or the second stages of the centrifugal pump?

A. Yes, but when you do that, you change the mode of operation of the entire system.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Bruce:

Q. In your testimony this morning with respect to defendant's Exhibit A, you made reference to a water system which you had manufactured, and I will show you a catalog, No. 142 of 1941, and calling your attention to Fig. 27-B on page 27 of the catalog, I will ask you if that is a water system which you had reference to (handing to witness).

A. Yes.

Mr. Bruce: We will offer in evidence the catalog 142.

The Clerk: Exhibit 11.

(Catalog referred to was received in evidence and marked Plaintiff's Exhibit 11.)

The Clerk: Are you offering it whole, the whole catalog?

Mr. Bruce: Yes.

That is all.

Mr. Mellin: No further questions.

Mr. Bruce: Now, we will call Mr. Armstrong. [150]

JOHN E. ARMSTRONG

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name?

A. John E. Armstrong.

Direct Examination

By Mr. Bruce:

Q. Your name is John E. Armstrong?

A. Yes, sir.

Q. And you are secretary and chief engineer of the plaintiff, Jacuzzi Bros., Inc.?

A. Assistant secretary and chief engineer.

Q. And how long have you held that position, Mr. Armstrong?

A. That of chief engineer, since 1941.

Q. And prior to that time you were employed by the same company? A. Yes.

Q. How long were you so employed?

A. Since the early part of 1937.

Q. And what have been your duties?

A. Since I have been—Well, all my duties were primarily with reference to the engineering department, designing pumps, operation of pumps, installation of pumps, and since becoming chief engineer it has also been the supervision of several engineers working on design and installation of pumps, and water systems.

Q. Pumps and water systems, pressure systems embodying the [151] injector system?

A. Yes.

(Testimony of John E. Armstrong.)

Q. Prior to that time did you have any experience in connection with pumps?

A. Yes, when I was a boy going to school, why, I worked in several mills in Nevada in which pumps were extensively, and I gained considerable experience in maintenance and operation at that time.

Q. You attended the University of Nevada in the School of Engineering? A. Yes.

Q. And since that time you have supplemented your study with other reading of various books relating to pumps?

A. Relating to pumps, also studying under Rachele Jacuzzi and Mr. Piccardo and other pumping engineers.

Q. You are the John E. Armstrong who is one of the joint inventors named in the patent 285?

A. Yes.

Q. Now, calling your attention to the exhibit—And you sat in the courtroom during the testimony yesterday, didn't you? A. Yes.

Q. Calling your attention to the exhibits 5 through 9, illustrating the water systems of the Berkeley Pump Company, you are familiar with those system, aren't you? A. Yes. [152]

Q. You have actually seen the actual pump?

A. Yes.

Q. And the system? A. Yes.

Q. Now, then, would you compare—withdraw that.

(Testimony of John E. Armstrong.)

Calling your attention specifically to Exhibit 5, I will ask you if the water system shown there embodies the inventive concept of your patent 285.

Mr. Mellin: I object to that, your Honor, as calling for the functions of the court as to whether it embodies the inventive concept, or not.

The Court: I am afraid so. If he answers that "Yes," then he is going to decide the case, isn't he?

Mr. Bruce: Well, we asked the question in that way, your Honor, because Mr. Mellin in his examination of this witness on his deposition followed the same procedure.

The Court: Well, you can't adopt the mistakes of someone else and make them good that way.

Mr. Bruce: Well, that may be.

Q. Well, referring to Exhibit 5, does the water system as shown there or illustrated in that exhibit embody the same mode of operation as is shown in the structure of Exhibit 3? [153]

* * *

Q. (By Mr. Bruce): Will you answer the question?

A. Will you read it, please?

(Previous question read by the reporter.)

A. Yes.

Q. Now, will you explain to the court how that is accomplished in the illustration of Exhibit 5?

A. Well, water from the first stage is discharged

(Testimony of John E. Armstrong.)

to service, which is similar to the water from the first stage being discharged to service in Exhibit 5. The balance of the water being brought up to a higher pressure to operate the jet in both cases.

Q. All right, will you follow through on the comparison, please? A. I don't understand it.

The Court: Well, he has covered it, hasn't he?

Mr. Bruce: Virtually, yes.

Q. Now——

The Court: He has covered it and he has the good quality of being brief.

Mr. Bruce: Well, that is very commendable, I think.

Q. Now, referring to the discharge, low-pressure discharge to the pressure line into the tank, is that what appears to be a valve there, is that a control valve (indicating)? [155] A. No.

The Court: Well, there isn't any dispute, is there, about that? Are you referring to No. 5, Exhibit 5?

Mr. Bruce: I don't know—yes, I am referring to 5, where the line leads to. 5 designated in that, the discharge line. And I am asking concerning the valve that appears there. That is not a control——

Q. Is that a control valve? You said it has no function in the system when it is in operation?

A. That's right.

Q. Now, what you have said—no.

Now, with reference to Exhibit 4, Figure 1 of

(Testimony of John E. Armstrong.)

your drawing 958, does the illustration in Figure 5 embody the same mode of operation?

A. Yes, it does.

Q. And will you explain how that is accomplished?

A. Well, water from the first impeller is discharged at low pressure through a valve-free connection to the pressure tank similar to that illustrated in 958, through a valve-free connection into the pressure tank. The high-pressure water being used to drive the jet in both cases.

Q. Now, there is a plug shown at 4, is there not?

A. Yes.

Q. And what is the opening at the plug 4, or the closure used for? [156]

A. That is used to take a high-pressure discharge by using a control valve of a similar nature in 285.

Q. And with the plug removed, does the figure in Exhibit 5 embody any other mode of operation as shown in 285?

A. Yes, that is the pressure equalization feature; that is a discharge on here, which can be located some distance away from the pump, the valve is opened and the water flowing back through the tank drops the pressure and places the system in automatic operation.

Q. Now, if Exhibit 4 was connected to a pressure tank, would a control valve be needed in that discharge from high pressure? A. Yes.

(Testimony of John E. Armstrong.)

Mr. Gray: I don't think you mean Exhibit 4.

Mr. Bruce: Exhibit 5, yes.

Q. Now, by the way, you are the John E. Armstrong who is named as one of the co-inventors in patent 958? A. Yes.

Q. Now, referring to Exhibit 7, or 6, rather—pardon me, here is 6.

The Court: May I ask a question, Counsel, if it won't bother your examination?

Mr. Bruce: Certainly, your Honor.

The Court: Something is not quite clear in my mind.

I understand that what you are saying, Mr. Armstrong, is that if the plug No. 4 is closed in Exhibit 5, the mechanism, [157] pump assembly, performs in the same way as is described in your Exhibit No. 4, and if the plug is opened and the mechanism in 5 is used with the plug open, then it operates substantially the same as in Exhibit 3?

The Witness: Yes.

The Court: Very well.

Mr. Mellin: If your Honor please, may I ask—

Mr. Bruce: Well, if your Honor please—

Mr. Mellin: I just want to clear one thing up. Didn't I understand you also, Mr. Armstrong, to say that when plug 4 is in place, the mode of operation is the same as in both 3 and 4?

The Witness: Yes.

The Court: All right. That makes it clear to me. Go ahead, Mr. Bruce.

(Testimony of John E. Armstrong.)

Q. (By Mr. Bruce): Now, referring to Exhibit 6, the structure there shown, it functions in the same manner, has the same mode of operation, as Exhibit 5? A. Yes.

Q. And it embodies, this figure illustration, embodies the same mode of operation as shown in Exhibit 3? A. Yes.

Q. And as Exhibit 4? A. Yes.

Q. And with the removal of the plug from the high pressure [158] discharge, the point of high pressure discharge—I will call that 14 (marking on diagram)—it functions—and connecting that to, or having a discharge there with a control valve, it functions with the same mode of operation as Exhibit 3, for the purpose of pressure equalization?

A. Yes.

Q. Now, referring to——

The Court: Before you go on with the next question, would you step down a moment? I have a criminal matter that I want to hear at this time.

(Whereupon, following the hearing of another matter by the court, the trial was continued as follows.)

The Court: All right, you may proceed.

Q. (By Mr. Bruce): Now, is it customary when you are using the discharge at high pressure from the opening or plug opening 14, is it customary to use that for the purpose of irrigation?

A. No, not generally.

(Testimony of John E. Armstrong.)

Q. What is the usual practice with pump men?

A. In general——

The Court: You are talking now about the use of Defendant's equipment?

Mr. Bruce: Yes, I am talking about the use of defendant's exhibits 6—5 and 6.

The Court: All right.

A. It could be used for irrigation, but in general the requirements [159] of the pressure system are generally desired at a higher pressure than in your irrigation discharge. But, for example, if 14 was delivering water over a hill that required a high pressure to get the water over the hill, they could take a high-pressure discharge from 14 for irrigation. But, generally speaking, low-pressure is used for irrigation. That is because it delivers more water.

Q. (By Mr. Bruce): Then you would simply switch the position of the pressure tank shown in Exhibits 5 and 6 to the high-pressure side?

A. Yes.

Q. And connect the discharge from the high pressure side; that is, through the opening 14 to the pressure tank?

A. Yes.

Q. And in that case there would be the necessity of a control valve in that line?

A. Yes.

Q. And that for the reason that there is a division of the water, and you have to divide the water to the tank, and yet—I will withdraw that.

(Testimony of John E. Armstrong.)

You would have to see that the needs of the injector system were supplied and take the difference for the customer's use?

A. Yes, where you have a control valve.

Q. Yes. Now, referring to Figure 7——

Mr. Gray: Exhibit 7.

Q. (By Mr. Bruce): Referring to Exhibit 7, does that show a [160] similar system to that shown in Exhibits 5 and 6? A. Yes.

Q. In this case you have an additional stage added in the pump unit, have you not?

A. Yes.

Q. Now, with reference to the patent 285, the structure there shown, does Exhibit 7 have the same mode of operation? A. Yes.

Q. And in the same manner as you explained with reference to Exhibits 5 and 6? A. Yes.

Q. And would you have the same thing to say as to Exhibit 4, patent 958? A. Yes.

Q. There is no injector shown on that, is there, Mr. Armstrong?

A. Not shown. However, the passages are not plugged, and the arrows indicate that an injector is intended for use with that pump.

Q. That is illustrated in the Exhibit 7-A, attached thereto? A. Yes.

Q. Now calling your attention—withdraw that. Does Exhibit 7 have the same mode of operation as shown in patent 958? A. Yes. [161]

Q. Now, referring to Exhibit 8, we will remove

(Testimony of John E. Armstrong.)

the overlay 8-A from it. That is a shallow well installation, isn't it? A. As shown, yes.

Q. Yes. But it is adapted, with the provision here for the installation, as a deep well installation, isn't it? A. Yes.

Q. Does that embody the same mode of operation as in patent 285?

A. Yes, one of the modes of operation.

Mr. Bruce: Pardon me, your Honor.

(Conversation among counsel out of hearing of the reporter.)

Q. (By Mr. Bruce): That is, it would involve the same mode of operation with the injector assembly attached as shown in Exhibit 8-A?

A. I don't think that question was completed, was it?

Q. Well, in other words, do you have to install—I will withdraw that.

In what way does Exhibit 8 embody the mode of operation of the structure of patent 285?

A. In that the low-pressure discharge is in pressure communication with the tank, so that the opening of the valve or a spigot on the discharge of 12 would draw the water from the tank to a low pressure, say 20 pounds, where the pressure switch would place the unit in operation. [162]

Q. In other words, that feature of the mode of operation of 285 is shown in Exhibit 8?

A. Yes.

(Testimony of John E. Armstrong.)

Q. And with the installation of the injector assembly, does it embody another feature of the mode of operation of Exhibit 3, of the patent 285?

A. Yes.

Q. Will you explain to the court the mode of operation now?

A. Water from the jet is taken into the first impeller, whereby it discharges into this chamber and has a low-pressure discharge, while the water in the low-pressure chamber comes through this second impeller and at a higher pressure divides and goes into the pressure tank and to the jet.

Q. Now, with reference to Exhibit 4, and in comparison, does Exhibit 8, with the over-lay embody the same mode of operation? A. Yes.

Q. And will you point that out, the mode of operation that is the same?

A. It has a valve-free discharge at low pressure with the high pressure being used to drive the injector.

Q. Wherever you take the pressure from the last, the stage of highest pressure, and you discharge to service, do you need a control valve?

A. Yes, or some other means of mechanically restricting the [163] flow.

Q. Now, with reference to Exhibit 9, that illustrates a shallow well installation, doesn't it?

A. Yes.

Q. And it is convertible to a deep well installation by the application of the injector system?

(Testimony of John E. Armstrong.)

A. Yes.

Q. And it is convertible to a deep well installation by the application of the injector system?

A. Yes.

Q. And the plug which is marked here, apparently, 6-A, is for that purpose, is it not?

A. Yes.

Q. Now, as illustrated there, is the mode of operation—does the mode of operation embody the same mode of operation as Exhibit 3, or would you have to remove a plug?

A. You would have to remove the plug, 6.

Q. And which plug would you remove?

A. No. 6.

Q. No. 6. That is the plug from the low-pressure discharge of the pump unit?

A. Yes. Well, you could remove—Yes.

Q. And that is the customary way of operating this system, isn't it?

A. Yes, it is shown by Exhibit 8. [164]

The Court: Well, if you were using No. 9 and the plugs were closed, where do you get the water for use, out of the tank?

The Witness: Yes, this is a shallow well pump, then, discharging from the point of highest pressure into the tank.

The Court: And then for use, you have to take the water out of the tank?

The Witness: Yes, your Honor, and in all of these there is assumed to be another opening on

(Testimony of John E. Armstrong.)

the tank which goes to the house or other service requirements.

The Court: All right.

Q. (By Mr. Bruce): Now, you say it is adapted for the attachment of the injector assembly, which is shown in the overlay, Exhibit 9-A? A. Yes.

The Court: If you wanted to use 9 without 9-A for irrigation purposes, how would you do it? Or would you use it at all for irrigation purposes?

The Witness: Yes.

The Court: I mean, without opening the plug.

The Witness: Oh, you could draw water from the tank for irrigation purposes, but it would be water at a higher pressure, and it would reduce the pressure in your tank. In other words, one of the important features of these pumps here is that when you are discharging at low pressure for [165] irrigation, these upper impellers or this upper impeller maintains enough water in the pressure tank so that the housewife in the house always has water for her domestic uses.

The Court: But if you use the water from the tank for irrigation purposes, then you couldn't accomplish that, is that what you mean?

The Witness: No. Then you would have a large pipe, a large opening, and the water pressure might drop down so that it wouldn't go into the house.

The Court: I see. All right.

Q. (By Mr. Bruce): Now, does Exhibit 9 em-

(Testimony of John E. Armstrong.)

body the same mode of operation as that illustrated in Exhibit 4 of patent 958?

A. Not without the plug being removed.

Q. The plug—you mean the plug—which plug are you referring to?

A. No. 6, the low-pressure discharge.

Q. No. 6. And would you—withdraw that.

Will you point that similar mode of operation out on the illustration, Mr. Armstrong?

A. Water coming from the injector through the first impeller enters this chamber, where it has the design to mechanically divide, and part of the water discharges at low pressure through the low-pressure irrigation service. The balance of the water discharging to the injector, and then this discharge could be without a control valve. [166]

Q. But used with the injector there, you would have to have a control valve in the high-pressure discharge? A. Yes.

Q. I believe it. Now, then, in installing pump systems such as illustrated in Exhibit 3, 285, what is one of the real problems that you have in installations, where you divide the pressure for the jet and to service?

A. The adjustment of the control valve presents a considerable problem in many instances.

Q. And will you tell what some of those problems are?

A. Well, the adjustment of the control valve varies as the water level in the well. In many

(Testimony of John E. Armstrong.)

instances you get a well which has high static water level, but when you start to pump on it, the water level drops down lower and lower, which necessitates closing the control valve more and more. During actual adjustment of a control valve, it is customary to open the valve up to a point; as you first start the system, the valve is closed and then you start opening the control valve and watching the pressure gauge very carefully. As your valve opens, more and more water discharges from the pump, and your gauge starts, the pressure on your gauge starts to go down. Now, when it reaches the critical point of operation, even though you don't open the valve any more, the gauge keeps on going down and that indicates that your pump is losing prime, or it is getting ready to go out of operation. So [167] if you are quick enough, you close the valve, and it will pick back up again. If you aren't quick enough, why, you close the valve and stop the motor and pour some more water in. Then you start all over again, and you only open it to a point, maybe one or two pounds above where the needle started to drop. Then you allow it to pump to make certain that the water level in the well doesn't draw down, and if the water level in the well starts drawing down on you, you will notice that your gauge starts to go down again. So you close the valve a little more and keep setting it a little bit higher and letting the pump go for maybe a couple of hours, until you think you have reached

(Testimony of John E. Armstrong.)

the maximum low water level in a well. Then the control valve is set for that. However, in many instances after a pump is operated for three or four days or a week, the water table in the area will be drawn down even a little more and require a service man or someone to go out and readjust the control valve to meet the new water level.

Q. In other words, the installation, where a control valve is involved, is quite a procedure?

A. Yes, in many instances.

Q. And in the embodiment of your invention as shown in Exhibit 4, 958, you have one of the features of it, is that you have obviated the necessity of all those adjustments?

A. Yes, that is true. And another important thing is that [168] when you have a water level in a well that fluctuates a great deal, the absence of a control valve will allow the pump additional water that is available when the well is at a high level. But if you have a system with a control valve, the pump would pump it and will pump part of it, but the control valve restricts it, and it can't get through. So that you don't have the advantage of being able to use the well as a sort of a reservoir.

Q. And isn't one of the points of advantage so far as 958 is concerned, that you have all of the pressure of the stage which operates the jet or operates the injector system, going to the injector system?

A. Yes.

(Testimony of John E. Armstrong.)

Q. And that feature permitted the obviating of the control valve? A. Yes.

Q. Now, as to the time of conception of the embodiment shown in the two patents in suit, were they conceived at the same time, or which one was conceived first?

A. 285 was the first one conceived.

Mr. Bruce: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. Armstrong, is the mode of operation of the pumping system shown in 285 the same as that shown in 958, Exhibits 3 and 4? [169]

A. Pardon?

Q. Is the mode of operation of the pumping system shown in 285 and 958, Exhibits 3 and 4, the same?

A. No, except that there is one thing in common with both of them, and that is a low pressure discharge at a pressure less than that used to feed the jet.

Q. Well, I understood you to say, for example, that the mode of operation of the pumping system shown in Exhibit 5, as illustrated, was the same as both 285 and 958? A. That's right.

Q. And I understood you to say that the same thing was true with respect to the other Berkeley Pump exhibits? A. I believe that is true.

Q. And that would be Exhibits 6, 7, 8 and 9?

(Testimony of John E. Armstrong.)

A. Substantially, correct.

Q. Now, during the last ten years the pumping conditions in some areas have changed, haven't they?

A. Yes.

Q. For example, in the Santa Clara Valley, the water table dropping?

A. Yes.

Q. And as those conditions change, the pumps used for wells in those areas must meet the new conditions; that is correct, isn't it?

A. Yes. [170]

Q. Now, I understood you to say—Beg pardon, strike that. I didn't.

Now, with respect to 285 and with particular reference to the low-pressure discharge nozzle 75, in the normal operation of that system, is it necessary or not to have a control valve there?

A. No, it is not needed, it is not essential to have a control valve at 75. You mean, will the pump operate without it?

Q. Well, I mean do you put one there in use or don't you?

A. Sometimes we do and sometimes we don't.

Q. How do you make the distinction?

A. Well, the purpose of the valve 83 is to balance the flow. The purpose of this valve is to——

Q. 83?

A. Yes, the valve 83. It is to balance the flow and to maintain a certain pressure in the tank. In other words, if we were discharging here at low pressure to service for irrigation, as we have said,

(Testimony of John E. Armstrong.)

and in some models of pumps the pressure in the tank might not be sufficient, say, so that the woman could draw water, maybe, in the second story of a house. In which case, by closing this valve slightly to put a little more pressure on this portion of the system, that the pressure in this portion can be raised up to maintain a balance or an adjustment to fit the conditions that are desired.

Q. Then as a matter of fact, whether you use a control valve [171] or its equivalent in the low-pressure discharge from the systems of 285 and 958, depends upon the conditions that you meet, varying conditions; some conditions you use them and some conditions you don't, depending upon the requirements of the cooking system?

A. In 285; in 958 you don't ordinarily use a control valve.

Q. Now, you don't ordinarily use it, but under some conditions of pumping systems, do you use it 958 in the pressure takoff to the tank?

A. Yes, you can recommend the use of a control valve or of a valve installed there for repair purposes, which would be left open.

Q. How about a control valve when you had a specially heavy jet requirement?

A. No, we have recommended control valves at that point for specific, special installations.

Q. In other words, when you meet a well con-

(Testimony of John E. Armstrong.)

dition that requires heavy pressure, then you put a control valve there?

A. No, I wouldn't say that was it.

Q. But there are some conditions, well conditions, to be met?

A. There are some well conditions that we do install a control valve there.

Q. Now, as a matter of fact, Mr. Armstrong, when you are pumping into a tank into a pressure tank as we have known it, that pressure in that tank offers a resistance to the flow and [172] creates a higher pressure in the pump than if you were pumping it to the atmosphere?

A. You mean if no water is being withdrawn from the tank?

Q. No, I haven't made myself clear, I am sorry.

Let's take Exhibit 4, and let's take discharge outlet 81, in which you have this, 79. A. Yes.

Q. Now, it is normal procedure, isn't it, to have, say, a minimum of 20 pounds pressure in that tank of water?

A. Well, that is what you like to have. A great many times, however—the purpose of a control valve is——

Q. Let me take it step by step.

A. Let me explain this to you.

Q. All right.

A. The purpose of this control valve, here, it wouldn't be required if, say, you had needed 20 pounds to drive the jet, and you had a pressure

(Testimony of John E. Armstrong.)

switch setting at 20 to 40 pounds, and you knew that they weren't going to draw water off here faster than you pump it. But in many instances somebody will be washing the car, the girl will be taking a bath and the woman is washing the dishes, and the pump only pumps five gallons a minute and they are using ten, in which case this pressure keeps on dropping here so that if you didn't have that control valve, the pump will cease to function.

Q. I see. Now, let's reverse that situation. Let's take [173] Exhibit 3, 285, and let's say you have a heavy requirement from the low-pressure spout (indicating). A. Yes.

Q. Let's say that you are drawing for service for sister's bath, and to wash the car, and that is taking a quantity, a gallonage per minute which is greater than the pump capacity at that point. What happens then?

A. You are discharging through this?

Q. 81, yes.

A. It still pumps. They just don't get it. In other words, their pressure drops, but they still continue to get water.

Q. What happens to the jet?

A. It still operates.

Q. And why is that, in the patented system?

A. Because the high pressure, the other impellers provide the water to drive, under pressure, the jet.

Q. Why doesn't all the water go out of 81?

A. Because the spider is so constructed so that

(Testimony of John E. Armstrong.)

the water comes in back of it and across the entrance where the pressure is the lowest at the entrance to the higher impellers, and it takes its requirements.

Q. I see. In other words, there is a spider construction in that particular stage at the low-pressure discharge which mechanically sends part of the water always to the intake of the next succeeding stage, and part of the water to the discharge [174] 81, isn't that a fact?

A. It is designed that way, yes.

Q. Now, you heard Mr. Jacuzzi testify this morning, as I understood him, that that was not the fact. What have you to say to that?

A. I think that Mr. Jacuzzi didn't understand your question.

The Court: Well, that doesn't help me any.

Mr. Mellin: I beg your pardon again.

The Court: All you can do is to get him to say whether he agrees or disagrees with somebody else.

Q. (By Mr. Mellin): But I mean, what you just testified to is the construction of the patented device? A. Yes.

Q. So that that was one of the features as set out in the patent, that was one of the features of your invention? A. I beg pardon?

Q. That was one of the features described in your invention, to provide a positive means for always directing a proper proportion of the water at the stage where you take off the low pressure to

(Testimony of John E. Armstrong.)

direct that into the intake of the next succeeding stage; isn't that correct?

A. Yes, that is accomplished in our pump by taking the greater portion of the discharge of the lower impellers and bringing it across underneath the upper impellers, which take their requirements. It is accomplished in the same manner in the [175] Berkeley pump by having the intake to this impeller at a lower position than this discharge.

Q. In other words, in the Berkeley pump that is accomplished by a chamber? A. No.

Q. Just a moment, I haven't finished, Mr. Armstrong, I am sorry. It is accomplished by a chamber and having the discharge at a higher point than the intake of the impeller?

A. That is the mechanical device, in the same manner that this is a mechanical device.

Q. I mean, that is the way it is done here?

A. Yes.

Q. And in the patented device, it is done by a series of special mechanical construction of long and short dividing vanes or ribs, isn't that a fact?

A. No, not necessarily.

Q. Do you recall what you have shown in your patent? A. Yes.

Q. And that is what is shown to do that?

A. I don't think it says that it has to be long and short ribs.

Q. Just to refresh your recollection, Mr. Armstrong—

(Testimony of John E. Armstrong.)

Mr. Mellin: May I have Exhibits 1 and 2?

Mr. Bruce: Well, we submit, your Honor, that the patent shows one of the preferred forms that the invention will take.

Mr. Mellin: I am only asking what is shown, nothing else. [176]

Q. (By Mr. Mellin): I show you Figure 2 of patent 958, and particularly call your attention to the vanes, 53 and 78 (indicating); that was the purpose of that construction of that spider, isn't it?

A. No.

Q. All right. Now, without some mechanical means at that particular stage in the patent in suit, as arranged, with the high-pressure discharge where it is, and the low-pressure discharge where it is in that pump, if you did not have some means of insuring, some means in the stage which is connected to the low-pressure discharge, of insuring that part of the water, the unnecessary part of the water, was directed to the suction of the succeeding stage, would that device be operative?

A. You mean could I design it so it wouldn't work?

Q. No, I mean, just leave it out in the patent and take that means of dividing water out of there—would that be operative?

A. I believe it would under most conditions.

Q. Did you consult during the prosecution of your application for the two patents your counsel, do you recall, during the time that those applica-

(Testimony of John E. Armstrong.)

tions were being acted upon in the Patent Office?

A. Mr. Piccardo handled the early part of it, and then after he left, why, I consulted with them.

Q. Do you recall at any time representing to the Patent Office [177] through your counsel that if such a provision was not made, that the system would be inoperative? A. Well——

Mr. Bruce: Now, if your Honor please—just a moment. We will object to that. The prosecution will show it.

The Court: Yes, I suppose that is true. Unless under a general rule of cross-examination, counsel is going to attack the credibility, let's say, of the witness?

Mr. Mellin: Yes, your Honor. I am not going into——

The Court: All you are asking is whether he can recall that, or not?

Mr. Mellin: Yes.

Q. Do you? A. No, I dont.

Q. You are familiar with that prosecution, are you? A. In general, yes.

Mr. Mellin: I would like to offer in evidence at this time, your Honor, the certified copies of the file wrapper and contents of both of the letters patent in suit as Defendant's Exhibits B and C.

The Clerk: Exhibits B and C.

Mr. Gray: B is what number patent, Mr. Mellin?

Mr. Mellin: B is 958 and C is 285.

(Testimony of John E. Armstrong.)

(Patents Nos. 958 and 285 were marked Defendant's Exhibits B and C in evidence respectively.) [178]

Mr. Bruce: Mr. Mellin, have you the entire file history of 285?

Mr. Mellin: I hope so.

Mr. Bruce: I am speaking now of the interference.

Mr. Mellin: Oh, yes, let me have that. I will offer that, too.

May I offer as Defendant's Exhibit D a certified copy of the file wrapper and contents in the matter of the interference, No. 81632?

Mr. Bruce: And the Rhoda patent? That was involved in the interference.

Mr. Mellin: Do we have that here? I offer a certified copy of the file wrapper and contents in the matter of letters patent of Ralph Rhoda, No. 2,313,566, Defendant's next in order.

The Clerk: Exhibits D and E.

(Interference proceedings and patent of Ralph Rhoda, referred to above, were received in evidence and marked Defendant's Exhibits D and E, respectively.)

Q. (By Mr. Mellin): May I read you this, Mr. Armstrong, and I am reading from page 8 of one of the papers in the file wrapper of patent 285, and it is marked "C-865" (that is the page is): (reading).

(Testimony of John E. Armstrong.)

“The above relationship, however, does not necessarily offer a complete solution to the problem in every case. For if the low-pressure discharge were permitted to divert [179] practically all of the water reaching that point in the pump unit——”

Now, the low-pressure discharge in that patent is 81, isn't it?

A. Yes.

Q. (Continuing reading):

“——leaving insufficient water to be carried up through the subsequent stages for supplying the nozzle of the injector assembly, the pump system could not reasonably be expected to function. The design of applicant's impeller unit at the low-pressure discharge stage is such, therefore, as to positively divert sufficient water to the subsequent stages for supplying the nozzle of the injector pump even with a low discharge outlet open to full adjusted capacity.”

Do you recall that that representation was made to the Patent Office, or do you not?

A. I believe it is correct.

Q. Now, that, of course, is the fact of the actual operation of 285, isn't that correct? A. Yes.

Q. So that if sufficient means for positively diverting the water is not present, then 285 would not function? A. That's right.

Q. So that the reason why no control valve is

(Testimony of John E. Armstrong.)

necessary in 285 and in 958 is the fact that a special impeller construction—I [180] mean stage construction—at the point where the low-pressure discharge is taken off, is that correct?

A. Well, I don't think it is so special that it wouldn't be good standard practice if you were designing a pump.

Q. But I mean in here, that was a new design at that time? A. Pardon?

Q. It was a new design at that time?

A. That's right. If you want the water to go up to the upper stage, you have got to make your pump so that the water will go to the next stage.

Q. Well, you have known that multi-stage pumps have been made for somewhere around 85 or 90 years, haven't you? A. Yes.

Q. And they always have water running from one to the other, without any—it didn't require any new construction at this time to do that?

A. No, but when you are taking a discharge out of a stage, you can design that stage so that all the water would fall out of the discharge and none would get to the other impeller.

Q. Yes, I understand that. Now, how long have you had knowledge of, let's say, what we call pump pressure systems, as such?

A. Since—well, we had one out on the ranch when I was a boy, but the water jet pump, since 1937, when I went to work for Jacuzzi Bros. [181]

Q. And prior to that they had been without

(Testimony of John E. Armstrong.)

jets that operated, except for the mechanical design, just exactly like 9 with the plug 6 in place, is that correct? A. Will you read it again?

(Previous question read.)

A. They had pumps discharging at the point of highest pressure, yes.

Q. I mean, they had a motor? A. Yes.

Q. And they had a centrifugal pump?

A. Yes.

Q. And a suction? A. Yes.

Q. And they had a pressure tank?

A. Yes.

Q. And an automatic switch? A. Yes.

Q. And some sort of a valve, control valve or something?

A. Well, not—not in a shallow well system; they didn't put a control valve in there, they put in a valve like that to be used for repair purposes.

Q. I see. But a shallow well pump——

A. A shallow well pump doesn't require a control valve.

Q. I see. Now, whether there is a control valve in such a system or not, when you draw water out of the system, the water [182] pressure in the entire system equalizes, doesn't it?

A. In systems of that type, yes.

Q. Yes. And that is also true of a system such as is shown in 9, when you add the jet or the overlay 9-A; am I correct? A. Well,——

(Testimony of John E. Armstrong.)

Q. With the plug still in place?

A. I am sorry, I have forgotten what the question was.

Q. Well, let's take the pump system shown in 9. Now, at least as early as 1947 you have seen jet pump systems which had exactly the same mode of operation as 9 with the plug 6 in place, with the overlay of 9-A?

Mr. Bruce: Pardon me. Did you say 1947?

Mr. Mellin: I beg your pardon, '37. I think he gave that date as when he became familiar with jet pumps.

Q. Isn't that correct? A. Yes.

Q. And in such a system when they had a jet, they used a control valve or other equivalent?

A. Yes.

Q. But when you drew water out of the system, when you opened the tap or faucet in the house, or wherever you were drawing it, the water in the whole system equalized, didn't it? That is true of all pressure systems?

A. Yes, disregarding a difference in head, due to elevation.

Q. Yes. [183]

A. That would be true in all systems of that type. There are some which don't equalize.

Q. In other words, the water would equalize and as water was drawn out of the system, and when it got down to the pressure the switch was set on, and the motor would start to operate and the

(Testimony of John E. Armstrong.)

pump would commence again? A. Yes.

Q. And as soon as that commenced, it became unbalanced again, the pressure would become unbalanced? A. Yes.

Q. So that is inherently present in all pressure systems, that equalization, isn't it? It is present in all types that you have ever known of?

A. That type of equalization, yes.

Q. So that the only thing that occurs in the type of equalization that you are calling for is that when you open—I am referring to Exhibit 8—the valve of 12 and draw water off at 12, the pressure in the tank comes back into the pump and discharges through 12, and the whole system is balanced, all the pressure equalizes again, doesn't it?

A. Will you read that, please?

Mr. Mellin: Or seeks to equalize; put it that way.

(Record read.)

A. Seeks to equalize, yes, in that particular type of system.

Q. I am reading from—— [184]

Mr. Mellin: May I have this marked for identification?

The Clerk: Exhibit F.

Mr. Bruce: What is it?

Mr. Mellin: It is the operating instructions and I think it is part of the Carpenter deposition.

(Testimony of John E. Armstrong.)

(Operating instructions were thereupon marked Defendant's Exhibit F for identification.)

Q. (By Mr. Mellin): Referring to Defendant's F, which is a Berkeley Installation Instruction, have you seen that, Mr. Armstrong?

A. I have seen Berkeley Installation Instructions; I probably have seen this one.

Q. Now, as a matter of fact,—

Mr. Bruce: Is that the same one that was introduced in Carpenter's deposition?

Mr. Mellin: I don't think it is the same one; I think it is a copy of it.

Mr. Bruce: Well, I stand corrected, then.

Q. (By Mr. Mellin): It says this:

“It is desirable to test the well, put a valve on the pump discharge and close it while priming. Attach a pipe to carry the water away from the well and start the motor. Open the valve to approximately 20 pounds gauge pressure. This is the point of maximum capacity. When the valve is wide open, you will notice a decrease in capacity. The pump [185] does not lose prime. You will note a rattly noise in the suction caused by heavy vacuum which is producing a throttling effect in the pump. It does no harm.”

Now, isn't it possible, Mr. Armstrong, to throttle

(Testimony of John E. Armstrong.)

the discharge in any one of these pump systems by means of a gate valve?

A. It is possible to throttle it, it is not standard practice to use a gate valve for any throttling purpose because, first, in the place of a control valve in a pump system, they are easily tampered with by children; and secondly, because gate valves are designed to be either wide open or all the way closed and in a half open position they would tend to rattle. The gate would vibrate and bang up against the seats.

Q. But if you have a gate valve such as in these various Berkeley pumps, and you are installing the pump, you could throttle it by means of the gate valve so that you would have half pressure?

A. It could be done, yes.

Q. And that, in that effect, it would operate perhaps not as efficiently, but it would operate the same as a control valve? A. Yes.

Mr. Mellin: May I offer the instruction sheet into evidence as defendant's next in order?

(Whereupon Exhibit F for identification was received in evidence.) [186]

Mr. Bruce: Mr. Mellin, do you want to put in all the exhibits in the Carpenter deposition?

Mr. Mellin: No.

Q. Now, with respect to Exhibit 5, that isn't the one I want—change that to Exhibit 7.

You are familiar with the Berkeley Pump con-

(Testimony of John E. Armstrong.)

struction of the runners or impellers and the volute casing, are you?

A. Yes. Not as familiar as they are, but I know what they look like.

Mr. Mellin: May I have the Berkeley pump?

(Pump Assembly was then brought forward and placed upon small table in front of witness stand.)

Q. (By Mr. Mellin): Does that agree with your understanding of the exhibit, as to the mechanical construction of a Berkeley pump?

A. Yes.

Q. Now, you do not find, other than the chamber which you referred to earlier, any mechanical means for positively diverting water from the discharge of one impeller to the intake of the other, other than that chamber? And by that chamber I mean——

A. Well, just the location of the plug in the chamber.

Q. Pardon?

A. It is the location of the discharge of the chamber.

Q. That is right. That was chamber 7 in Exhibit 7?

A. Yes. [187]

Q. So that the water from the discharge, all of the discharge of the water in the—I am referring to Figure 5—all of the discharge from the water from the impeller too is discharged from its own pump casing, isn't it?

A. Yes.

(Testimony of John E. Armstrong.)

Q. And it goes into the chamber, which I now mark on Exhibit 5, 8-A, is that correct?

A. Yes.

Q. And there it goes by gravity or under the influence of the pump pressure partly into the intake of the runner or impeller, 3, is that correct?

A. Yes.

Q. And the other part discharges through the outlet into the pressure tank or wherever you are taking it to, is that correct? A. Yes.

Q. Now, would you say that there is no requirement for any restriction of some character or resistance to the flow of water into the outlet, which I mark 8-B on Exhibit 5?

A. Will you read that question?

(Record read.)

A. That pump doesn't require a control valve. Is that what you mean—or a restriction?

Q. It does not require any restriction?

A. That's right.

Q. If there was not—Strike that. [188]

If there was no restriction in there, the pressure in the chamber, 8-A, would be atmospheric, wouldn't it? A. Yes.

Q. And atmospheric, it wouldn't raise above the level of the outlet 8-B, it would just fall on the ground, wouldn't it? A. Yes.

Q. So that wouldn't be practical to pump into a

(Testimony of John E. Armstrong.)

tank and create pressure, would it, if that were still atmospheric?

A. Well, as it flows into the tank it builds up pressure.

Q. So that as it flows into the tank, it builds up resistance, a resistance builds up to the flow of water through the port 8-B, is that correct?

A. Yes. Well, not resistance, but the tank pressure becomes, it bucks it.

Q. Bucks it, so that there is a resistance to pumping out of the port, 8-B, from the pump chamber? A. Yes.

Q. And that resistance raises the pressure in chamber A, doesn't it?

A. Well, it has got to get higher in A in order for water to get into the tank.

Q. In other words, that is, it has to get higher and higher until the minimum pressure in the tank is reached? A. Yes.

Q. So that actually from that viewpoint we have substituted the [189] pressure in the tank as a resistance for the resistance of a restriction in the port, discharge port 8-B; isn't that a fact?

A. No, I think they are altogether different. The pressure in the tank is one thing and the control valve that keeps the pump in operation is another thing.

Q. Well, the pump automatically goes in operation when the pressure in the tank lowers, doesn't it?

(Testimony of John E. Armstrong.)

A. Yes, but in the case of one which requires a control valve, you take the control valve out, it is possible to draw sufficient water from the tank to make the pump inoperative.

Q. Now, would you say, Mr. Armstrong, that in the Berkeley pump system——

Mr. Mellin: And may I offer this Berkeley pump part which is here next in evidence, Defendant's next in order?

The Court: It may be admitted and marked.

(Whereupon pump mechanism, Berkeley Pump Company, referred to above, was marked Defendant's Exhibit G in evidence.)

Q. (By Mr. Mellin): Would you say that there are in the part that I am showing you, which is cut away, and is only the centrifugal part, of course, Mr. Armstrong? I am saying that for the record. Are there two centrifugal pumps there, or is it just one? A. One.

Q. Are there more than one centrifugal pump in 285 or just one? A. One. [190]

Q. You would definitely state, then, that 285 does not disclose a low-pressure pump and a high-pressure pump?

A. The effect could be the same as that, but it is one pump. When we sell it to a man, we bill him for one pump, we don't bill him for two.

Q. Well, could you say that it is a low-pressure

(Testimony of John E. Armstrong.)

centrifugal pump and a high-pressure centrifugal pump?

A. I think you could say that for purposes of explanation to someone.

Q. Then you could also say likewise that the Berkeley device is two centrifugal pumps, is that so or not?

A. You mean with the low-pressure discharge on it there is a means for getting low pressure, there is a means for getting high pressure?

Q. You wouldn't say that there was two centrifugal pumps? It is not a trick question, Mr. Armstrong. I have a definite reason for the answer.

A. Well, I would say it is one centrifugal pump.

Q. I see.

A. Multi-stage centrifugal pump.

Q. A centrifugal pump, a multi-stage centrifugal pump. Yes, and that is what you would say of 285?

A. Yes, and conventional.

Q. And 958. Now, I want to point this out to you on Exhibit 9 and the other exhibits from 5 to 9: There is a complete volute [191] casing for each impeller in the Berkeley pump?

A. I would assume so.

Q. And so there are two impellers and two volute casings, but they are driven on a common shaft?

A. Yes, there is one shaft.

Q. Now, are you aware of the fact that centrifugal pumps have been built long prior to 1940,

(Testimony of John E. Armstrong.)

ordinary centrifugal pumps, in which there are selective discharges from the pump? In other words, where you can select, where you want to select the discharge off the pressure from the first impeller or the second impeller or the last impeller? A. Yes.

Q. And it was an old device at this time? I mean,— A. Pardon?

Q. That was old in 1940?

A. Yes, I believe it was.

Q. So in effect, disregarding the manner in which this matter is taken in disregarding the jet, and assuming that the pump has a casing, two runners and two discharges, one from the second impeller and one from the first, disregarding all other things—that is merely that that operates merely on the principle of an old centrifugal pump with selective discharges? A. Yes.

Q. Is that correct?

A. But you can't disregard all of those things.

Q. Well, I mean if you disregard them, just strip the system down to the bare centrifugal pump.

The Court: We will take a brief recess.

(Recess.) [192-A]

Mr. Mellin: No further cross-examination.

The Court: Anything else of this witness?

(Testimony of John E. Armstrong.)

Redirect Examination

Q. (By Mr. Bruce): Mr. Armstrong, referring to Exhibit 5, the Berkeley Pump structure, is there any means provided for the water delivered from the first stage of the pump to the inlet of the second stage?

A. It is provided by way of design in having the inlet to the second stage lower than the low pressure discharge.

Q. The effect of the casing and in the design is to favor the delivery of water to the second stage of the pump unit? A. Yes.

Recross Examination

Q. (By Mr. Mellin): Mr. Armstrong, the water that goes into the chamber 7 from the first impeller follows natural laws, either the path of least resistance or gravity?

A. Chamber 7 of Exhibit 7?

Q. Yes.

A. Yes, it is designed to do that.

Q. In an ordinary multi-stage centrifugal pump with more than one discharge passage, where a different stage is provided and arranged horizontally with a stage going from the top of the pump vertically, that same thing follows, doesn't it?

A. I am afraid I do not follow you.

Mr. Mellin: May I diagram it, Your Honor?

(Testimony of John E. Armstrong.)

The Court: Surely.

Q. (By Mr. Mellin): Now, you would have a discharge A and a discharge B and inlet C and impellers D, a multi-stage arrangement on a single shaft, diametrically, of course, so that from the intake it goes into the suction of one and is discharged through A, and then part of it goes, or if A is completely closed, all of the fluid goes through the successive stages B. By the way, those are the pumps you and I were discussing where there was selective discharge for a centrifugal pump. In general, that is the scheme of them, isn't it?

A. Pardon?

Q. In general, that is the cycle or the pattern or the flow cycle?

A. Of that pump, yes.

Q. Of that kind of pump? A. Yes.

Q. When we were discussing selective multiple discharge out of the centrifugal pump?

A. We were discussing quite a few pumps and I don't remember.

Q. Taking my diagram as a hypothetical pump, wouldn't we have the same force of gravity that you say we use in Exhibit 7 to feed the intake of the second stage? Wouldn't we have that same gravity condition in the sketch which I mark H for identification? A. Yes. [194]

Mr. Mellin: May I offer that sketch in evidence, Your Honor, as our exhibit next in order?

(Testimony of John E. Armstrong.)

(The sketch referred to was thereupon received in evidence and marked Defendant's H.)

Mr. Mellin: That is all.

Further Redirect Examination

Q. (By Mr. Bruce): Mr. Armstrong, that has nothing to do with an injector assembly, has it?

A. No.

Mr. Bruce: No further questions of this witness.

At this time, if Your Honor please, I think Mr. Mellin will probably stipulate to this: I would like to introduce some literature published by the Berkeley Pump Company relating to Exhibits 5 through 9, and which were identified in the deposition of Mr. Carpenter, the president of the Berkeley Pump Company. Have you any objection to that?

Mr. Mellin: No.

Mr. Bruce: Then we would like to introduce as Exhibit next in number Bulletin 501 of the Berkeley Pump Company.

(The bulletin referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Bruce: Bulletin 503, second edition of the Berkeley Pump Company.

(Bulletin 503, Second Edition, was thereupon received in evidence and marked Plaintiff's Exhibit No. 13. [195])

Mr. Bruce: Bulletin 506, July 25, 1947, Berkeley Pump Company.

(Bulletin 506, July 25, 1947 was thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Bruce: Bulletin No. 500 of the Berkeley Pump Company.

(Bulletin 500 was thereupon received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Bruce: An advertising circular entitled "Gracious Country Living."

("Gracious Country Living" was thereupon received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Bruce: Catalogue No. 2 of the Berkeley Pump Company.

(Catalogue No. 2 was thereupon received in evidence and marked Plaintiff's Exhibit No. 17.)

Mr. Bruce: Installation and operating instructions, small sheet.

(Installation and operating instruction was thereupon received in evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Bruce: At this time further we would like to introduce a certified copy of the Rhoda patent involved in the interference.

Mr. Mellin: It is already in.

Mr. Bruce: Did you introduce that?

Mr. Mellin: Yes.

The Court: Defendant's Exhibit E.

Mr. Bruce: I think that is our case in chief,
Your Honor. [196]

The Court: Very well.

Mr. Mellin: If I may address the Court, the witness that was supposed to be here was absolutely unavailable until the first thing tomorrow morning, Your Honor, so I will try to do the best I can to fill in with the other things we were going to offer.

FRED A. CARPENTER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Mellin): Will you give your age and residence, Mr. Carpenter?

A. 50 years old, 915 Mendocino Avenue, Berkeley, California.

Q. What is your occupation?

A. Pump manufacturer.

Q. What are you by training, Mr. Carpenter?
Are you an engineer by training?

A. By training I might be called a practical engineer, a pump engineer.

Q. What is your experience in pumps?

A. Starting in 1919 I had 11 years experience

(Testimony of Fred A. Carpenter.)

with Byron Jackson Company, and in 1932 I started making pumps on my own hook.

Q. And you have been in the pump business ever since?

A. I have been in the pump business ever since.

Q. Byron Jackson are one of the largest manufacturers of pumps in the country, aren't they?

A. They are one of the largest on the Pacific Coast.

Q. You are now active in the Berkeley Pump Company?

A. Yes, sir.

Q. You are an officer?

A. Yes, sir.

Q. What office?

A. I am president.

Q. You are familiar with the business of the Berkeley Pump Company, the defendant, during the last—By the way, when was it started?

A. It was incorporated in 1937.

Q. Was it a partnership before that or after that?

A. There was a brief period of partnership, oh, maybe a month or so, while we were organizing.

Mr. Bruce: Pardon the interruption. Is that the Berkeley Pump Company or the Berkeley Pump Corporation?

The Witness: Well, to clarify it, it was called the Advance Machine Works for just a short time, in taking over a partnership firm, when I joined it, until the incorporated papers were drawn up and filed; it operated that way just a short time.

(Testimony of Fred A. Carpenter.)

In March 1947 it became the Berkeley Pump Corporation.

Q. (By Mr. Mellin): And was it a partnership after 1937?

A. Yes, it was changed, I believe, in 1942 to a copartnership. [198]

Q. What is it now?

A. It is now back in a corporation.

Q. When did that commence?

A. I think in 1946.

Q. Are you familiar with the various types of well pressure systems? By the way, how long have you been familiar with well pressure water systems of the general character we have been discussing?

A. Oh, I would say since 1925.

Q. Did or did not the Berkeley Pump Company manufacture water pressure systems as we have been discussing heretofore?

A. Did it or did it not?

Q. Yes.

A. We started right off with water systems.

Q. That is water pressure systems?

A. Yes.

Q. When, if you ever did, did you commence to manufacture a two-stage pump for use in conjunction with water systems or for other pumping?

A. We started early in 1937.

Q. I show you a diagrammatic chart and ask you to disregard the red marks thereon and ask you

(Testimony of Fred A. Carpenter.)

if your recognize that diagram as a pumping system.

A. Yes, I do.

Q. Will you tell us about it, please? Let us start this way: Is that a system such as was manufactured by Berkeley Pump? A. Yes. [199]

Q. Commencing when? A. 1937.

Mr. Mellin: May I have that chart marked for identification?

Mr. Bruce: You can put it in evidence directly if you would like.

Mr. Mellin: I will offer that in evidence as defendant's next in order.

(The chart referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Q. (By Mr. Mellin): How many stages does that pump have?

A. It has two stages, and if you want to call the jet a stage, It would be three for the entire system.

Q. Does it have a motor for driving the impellers of the two stage system?

A. Yes, that shows the motor.

Q. What is the difference between the impeller structure and the casing for the impeller structure in Exhibit I, and the impeller structure and the casing structure shown in Exhibit 5?

A. They are substantially the same.

Q. Assuming the flow of fluid only, not the dis-

(Testimony of Fred A. Carpenter.)

charge of it, assuming only the flow of the fluid in the pump itself and through the jet, is there any difference in the cycle of flow in that Exhibit I and Exhibit 5 or not? [200]

A. There is no difference when you first consider the discharge.

Q. As I understand it, the suction from the jet goes in precisely in the same manner in I as in 5?

A. That is right.

Q. And discharges in the pump casing in the same fashion? A. Yes, that is right.

Q. And goes back and around and enters from the top into the suction of the upper impeller?

A. That is right.

Q. And from the upper impeller it goes downwardly and is discharged to the jet, is that correct?

A. That is correct.

Q. So far as that cycle is concerned, Exhibit 5 and Exhibit I are precisely alike, is that correct, or incorrect?

A. That is correct.

Q. Would you tell us, please, did you hook these up in systems of various kinds?

A. Yes, we used them in quite a variety of uses.

Q. Referring to Exhibit I, and, as I understand it, the dotted lines indicate pipe——

A. That is right.

Q. Will you tell us, please, where the discharges are there, how the water discharges?

(Testimony of Fred A. Carpenter.)

A. Exhibit I shows water by arrow going out the high pressure [201] discharge, that is, the discharge from the last stage.

Q. The one I label A? A. That is correct.

Q. Did you use a control valve or some other resisting medium at that point?

A. Yes, we did.

Q. What is the pipe that I mark B?

A. That we call the pressure pipe, the pipe that conveys water to the jet assembly.

Q. Then, as I understand it, the water from the second stage divides, part of it going out A, part down the pipe B to the jet C?

A. That is correct.

Q. And then upwardly into pipe D to the suction of the lower impeller, the first impeller, which I mark 1? A. That is correct.

Q. And from thence it goes into the chamber which I mark 2? A. That is correct.

Q. And from thence into the intake of the second impeller, which intake I mark 3?

A. That is correct also.

Q. And I mark the second impeller by the number 4. At any time will you state whether or not you had any low pressure discharge from this pumping system prior to 1940?

A. Yes, on many occasions we put a T on the suction pipe D. [202]

Q. I show you a second chart. Does that correctly illustrate the same pump structure as in I?

(Testimony of Fred A. Carpenter.)

A. Yes.

Mr. Mellin: I offer that chart in evidence as J.

(The chart referred to was thereupon received in evidence and marked Defendant's Exhibit J.)

Q. (By Mr. Mellin): Where did you put the T, please, and is it illustrated?

A. The T is illustrated as being installed in the suction pipe.

Q. The suction pipe I labeled D, and I will label the T as E, is that correct? A. That is correct.

Q. What happens when you put the T in there, if anything?

A. You have another outlet for the water.

Q. And is that the discharge which I mark F?

A. Yes.

Q. And that is a low or a high pressure discharge?

A. That would be called a low pressure discharge.

Q. I notice on J there is a pipe plug drawn in red and labeled A. What have you to say about that opening and with respect to the pipe plug, which I notice here as a pipe A in Exhibit I?

A. When the pumping system is to be used solely to deliver your pressure water from a deep well, there is no need to use the outlet marked A; so it is plugged.

Q. As shown in Exhibit J in red? [203]

A. As shown in Exhibit J in red.

Q. In that event, where is all the water which is

(Testimony of Fred A. Carpenter.)

discharged from the last or stage of highest pressure directed?

A. It is all directed to the jet assembly.

Q. Will you state whether or not at any time there was a high pressure discharge from the point A in Exhibit I as well as a low pressure discharge as shown in Exhibit J or not?

A. Yes, on several occasions we used both discharges as shown in A and the low pressure discharge shown at F.

Q. Will you state whether or not it is possible to take water from both points at the same time?

A. It is possible, but it is not very practicable.

Q. I asked you to bring with you a record of at least one sale of the system such as shown in J and modified as you speak of it in I with a pipe from the high pressure point A. Did you hand me such a record?

A. Yes, I handed you such a record.

Mr. Mellin: May I have these documents fastened together and marked for identification as one exhibit, Your Honor?

(The documents referred to were thereupon marked Defendant's Exhibit K for identification.)

Q. (By Mr. Mellin): I will hand you what is labeled K for identification, which consists of four documents. Where did you obtain these?

A. We obtained these from the files of the Berkeley Pump [204] Company.

(Testimony of Fred A. Carpenter.)

Q. The first document I see at the rear is a sketch. It is a sketch of what?

A. It is a sketch of a proposed pumping system as drawn by our salesman.

Q. Do you know when?

A. I know it was drawn prior to the date of this invoice, which was July 24, 1939.

Q. What does the invoice show?

A. The invoice shows the pump was sold to Frank J. Dennis of Oakland, California.

Q. When did you first see this sketch that is attached to it?

A. Some time prior to the date of that invoice.

Q. Why would it be that you saw it at that time? Will you explain what your duties at Berkeley Pump were at that time?

A. As president I was also chief engineer.

Q. And these other documents all pertain to that sale? A. Yes.

Q. And were all made at the time and on the dates that they bear? A. That is right.

Mr. Mellin: May I offer that, Your Honor, as next in order?

Mr. Bruce: I may want to reserve an objection to it.

Mr. Mellin: May I withdraw the offer, Your Honor, for a moment? There was a sketch in there I did not see. [205]

Q. I also notice, which I overlooked before, a

(Testimony of Fred A. Carpenter.)

sketch on a telegraph blank that is in there. Do you recognize that sketch?

A. Yes, I made that sketch.

Q. When was that made?

A. That was made on July 17, 1939.

Q. How do you know that? Is it dated?

A. The sketch was a part of the order to be entered which was written on that date by myself.

Q. And the note that you just referred to, which is the third sheet, is the handwritten order by you?

A. That is the handwritten order, yes.

Mr. Mellin: I offer that in evidence as next in order, Your Honor.

Mr. Bruce: We would like to object to that at this time and ask leave to ask a few questions on voir dire of this witness for the purpose of laying a foundation for the objection.

The Court: What is this drawing?

Mr. Mellin: It is part of the prior art and to prove this system was made and sold by them prior to 1940.

The Court: Prior to the application for these patents?

Mr. Mellin: More than a year prior to them, yes.

The Court: You wish to ask questions going to the admissibility of the documents, as to the foundation?

Mr. Bruce: Yes, Your Honor.

(Testimony of Fred A. Carpenter.)

The Court: Very well. [206]

Q. (By Mr. Bruce): Mr. Carpenter, this invoice pertains to one type of pump, does it not?

A. Yes.

Q. And the type of pump that it refers to, there are two sketches attached to it of two pumps. Which one does the invoice refer to?

A. The invoice refers to the sketch that I made.

Q. It refers to the sketch you made?

A. This one right here.

Q. It does not refer to the other? A. No.

Q. It does not refer to the second sketch, the last sketch on there?

A. It does to a certain extent because the other sketch is a salesman's idea of how a pumping plant could be put in.

Q. But that second pump is not the one that is covered by the invoice?

A. Which one? This one here?

Q. Yes.

A. This is not a pump; this is merely a sketch.

Q. It is a sketch but it shows a pump system, doesn't it? A. Yes, that is right.

Q. That is not the one that the invoice covered. The one that the invoice covered is the one which you made on the telegraph blank? [207]

A. That is right.

Q. That is the one that the invoice covers and the other not? A. That is right.

Mr. Bruce: We object to the offer as it particularly pertains to the last mentioned sketch.

(Testimony of Fred A. Carpenter.)

Mr. Mellin: If Your Honor please, it is all part of one transaction.

The Court: As I understand it, the salesman drew up his idea of a pump and then an order was taken and a pump was constructed and sold that conformed to the sketch which the witness made.

The Witness: That is right.

The Court: With that explanation wouldn't it be proper to admit all of the documents? Although I agree with you, I do not see much point in having the exhibit cover anything more than the sketch which the witness made, and which he said was the basis of the construction.

Mr. Mellin: Actually, Your Honor, they are only very diagrammatic sketches of the pumping system.

Mr. Bruce: Your Honor, I do not see any harm in it anyway. We will withdraw the objection.

The Court: Let it be marked.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit K.)

Q. (By Mr. Mellin): Mr. Carpenter, will you diagram for us, [208] please, the pumping system which you have illustrated on your sketch on the large chart and explain the fluid flow cycle in it as with regard to the direction and with regard to pressure? By the way, how is the pump illustrated in your sketch? Was that the same pump as in Exhibit I, as far as the centrifugal pump structure was concerned, or different? A. It is identical.

(Testimony of Fred A. Carpenter.)

The Court: It is what?

Mr. Mellin: It is identical.

The Court: What is the good of drawing it?

Mr. Mellin: This is the system, Your Honor. It is a little different system.

The Court: He said it is the same.

Mr. Mellin: The pump structure itself is the same. That is not what I am considering. It is just the fluid cycle flow. It won't be long.

(The witness made a diagram.)

Q. (By Mr. Mellin): What does that indicate that you have just drawn?

A. This is a valve, this is a discharge to a high elevated tank. This is a T, a plug, and the pipe leading to a low elevation tank that had a screen on the end of it.

Q. Could you with arrows give us the direction of flow in the sketch? That is the jet. Will you label that the jet, please? What line is that? [209]

A. That is the suction pipe.

Q. Will you label that, please? Will you label this element, please?

A. That is the pressure pipe.

Q. Will you diagram the flow of the fluid in the pump with arrows?

A. Part of the time the water was falling like this.

Q. Put an arrow there, please. Divided at that point.
A. Divided at that point.

(Testimony of Fred A. Carpenter.)

Q. At that point put an A, please, and the fluid entering the pump would flow past the first impeller? A. That is right.

Q. Label the first impeller B. And then through the casing? A. That is right.

Q. And then through the suction of the second impeller? A. That is right.

Q. Will you label the second impeller C, please? And then from the discharge of the second impeller.

A. Out of the pump into a T. When this is open, when they want it to pump water in here, this was closed so all the water from the high pressure pump went to the jet assembly.

Q. Was that system actually installed, Mr. Carpenter, to your knowledge, or not?

A. That was installed and working.

Q. And is it still in operation or not? [210]

A. It is still in operation, to the best of my knowledge.

Q. Did it operate successfully for the purpose it was intended?

A. Yes, the customers were quite pleased with it because it was quite a unique installation.

Mr. Mellin: May I offer this sketch just drawn by the witness as our exhibit next in order to illustrate his testimony?

Mr. Bruce: Just one question. We might not have any objection.

Q. Is that the same pump that is shown on your

(Testimony of Fred A. Carpenter.)

sketch on the telegraph blank or have you amplified it?

A. I have intended to make it diagrammatically the same.

Q. Have you added anything to the sketch that you have drawn over what is shown on your sketch on the telegraph blank?

A. Well, let's see. I will check it. There is the valve. That is correct. I have not attempted to show the elbow. We could call this an elbow. There are two discharges on this pump. One was up here and the other discharge connected to the jet only.

Q. In other words, the illustration which you have sketched is not wholly like that shown on the telegraph blank?

Mr. Mellin: I did not ask him to duplicate the sketch, Mr. Bruce.

Mr. Bruce: You asked him to explain it.

Mr. Mellin: That is what he did.

Mr. Bruce: But you have changed certain figures. [211]

The Witness: I made no changes in the flow cycle.

Q. (By Mr. Bruce): But you have in the structure?

A. Or the method of operation or the structure.

Q. (By Mr. Mellin): Does that invoice tell you what design of pump, the invoice you have, Exhibit K, what design of pump is involved?

(Testimony of Fred A. Carpenter.)

A. Yes, it is the drawing used in making the pump.

Q. Do you know of your own knowledge that that is the two-stage pump that you have sketched in the sketch that you made? A. Yes.

Q. And that is the same shown in Exhibit I?

A. That is the same.

Mr. Bruce: Have you the original sketch from which you made the pump?

Mr. Mellin: I have a photograph of it, if you will give me time.

Mr. Bruce: We will object to this as attempting to establish by something the witness has testified to now a date back in 1939, which does not correspond with the drawings he claims to have made in 1939, and therefore we object to the admission of this drawing that the witness has just made.

Q. (By Mr. Mellin): Are there any differences, Mr. Carpenter, between the flow cycle of the pumping system that you have just diagrammed and that shown on the telegram Exhibit K?

A. No difference. [212]

Mr. Bruce: He has admitted that there is a difference in structure and that is the basis of our objection.

Mr. Mellin: Your Honor, there is no structure shown. It is merely diagrammatic.

The Court: May I see the exhibit? Pumps were much cheaper in 1939.

The Witness: That is right, Your Honor.

(Testimony of Fred A. Carpenter.)

The Court: The order refers to a sketch furnished by F. A. Carpenter.

Mr. Mellin: Yes, that is the salesman.

The Court: F. A. Carpenter is not the witness?

Mr. Mellin: Oh, F. A. Carpenter, yes. I beg your pardon.

The Court: You said you had some photostat of that sketch that was furnished by F. A. Carpenter?

Mr. Mellin: That is the sketch, Your Honor, that is attached.

Q. Isn't that so, Mr. Carpenter, or not?

A. I believe so.

The Court: According to the order, there must have been some sketch that was furnished to Mr. Dennis, the purchaser, and they would not refer to the sketch that the witness made that was kept in the company's file. He must have referred to some sketch that was furnished.

Q. (By Mr. Mellin): Mr. Carpenter, can you explain that?

A. Yes, the order to produce the pump, you might say, referred to a sketch made by F. A. Carpenter, to show them how to hook up [213] a pump. The order I wrote out is an order to construct the pump and also to be used in typing up the invoice.

The Court: You must have given the man a sketch along with this order.

Mr. Mellin: We can produce many other sales, Your Honor, if there is any question about it. We will produce them.

(Testimony of Fred A. Carpenter.)

The Court: It may not be. I may be incorrect about that. This is the company's order. It is signed by the purchaser. It might not be that the sketch was furnished to the purchaser but was attached to this order. It may have been given to the purchaser on the copy of the order which he probably received. I suppose these orders were issued in duplicate.

Q. (By Mr. Mellin): Could you explain that, Mr. Carpenter, with those papers?

A. Yes. The first blue piece of paper is our copy of the invoice. The second piece of paper is the sales order covering the unit.

Q. Who does that go to?

A. That is turned in to us by the salesman who sold the pump and signed by the customer who purchased the pump.

The Court: The purchaser got a copy of that?

A. Probably did.

The Court: Maybe he was furnished with a sketch at the time.

The Witness: It says here, "Take all pipe as approved. Sketch furnished by F. A. Carpenter. Pump is guaranteed to pump [214] well continuously, discharging into storage tank. Any water above foot valve will not lose prime."

Q. (By Mr. Mellin): And that installation, to your knowledge, was made in accordance with the sketch that is there? A. Yes.

Mr. Mellin: I submit, Your Honor,—

(Testimony of Fred A. Carpenter.)

The Court: That has been admitted. The question that has been raised by your opponent is whether or not the sketch that you now had the man draw—I do not know why you were not content to rest on what you put in here on the order, if the witness testifies to what that meant. Now, you have him draw something else. It may be someone different.

Mr. Mellin: The diagram is the same. What he is objecting to, as I see it, is the fact that he has drawn two impellers in here instead of an outside view of the pump. Is that correct?

Mr. Bruce: No, he has changed other parts of it.

Mr. Mellin: I will withdraw the offer and I will leave the witness explain it from his own sketch.

Q. Go on, will you, Mr. Carpenter? Will you explain the system from the sketch, that is, on Exhibit K? A. This——

Q. Don't diagram it. Just explain it from the sketch on Exhibit K.

The Court: What kind of pressure system does the sketch that you have here attached to that order describe? That is what [215] you want.

Mr. Mellin: Yes, the sketch attached to the order of Exhibit K.

Q. What kind of pump does it describe, that entire document? Does it or does it not describe the actual pump structure, leaving out the pipe as shown in Exhibit I?

Mr. Bruce: Your Honor, that is leading and suggestive.

(Testimony of Fred A. Carpenter.)

Mr. Mellin: I said does it or does it not?

The Court: It is not leading if it calls for either a yes or a no answer.

Mr. Bruce: I guess that is right, so says the Code.

The Witness: The sketch does refer to the pump and the jet assembly shown on Exhibit I.

Q. (By Mr. Mellin): Does any other particular paper refer to that type of pump, the invoice, for example, or the sales order? A. To any pump?

Q. This particular pump in Exhibit I by number.

A. The papers all refer to the same pump.

Mr. Bruce: Your Honor, we object to this line of questioning. The sketch which the witness holds in his hand is not the best evidence.

The Court: It has been admitted in evidence. The witness has testified it is the same as Exhibit I. The other side can cross examine him on it. I think that is enough.

Q. (By Mr. Mellin): Will you tell us, is there a low pressure [216] connection on the sketch shown in Exhibit K?

Mr. Bruce: Now, Mr. Carpenter, you are looking at one of the exhibits rather than the exhibit K—Exhibit I or J.

Mr. Mellin: He has Exhibit K in his hand, Mr. Bruce.

Mr. Bruce: Mr. Mellin, he is looking at Exhibit I and J rather than the one that he has in his hand,

(Testimony of Fred A. Carpenter.)

and your question is directed to what he had in his hand.

Mr. Mellin: All right.

Q. From the sketch that you have in Exhibit K——

Mr. Bruce: I don't know what you are trying to build up.

Q. (By Mr. Mellin): ——is there a low pressure takeoff in Exhibit K in the system?

A. Yes, there is.

Q. How does that compare with the low pressure takeoff shown in Exhibit J?

A. It is taken from the same place as in Exhibit J.

Q. Does it have a high pressure takeoff or not?

A. Yes, it has a high pressure takeoff.

Q. Is the high pressure takeoff similar to that shown in Exhibit I or not at A?

A. Yes, it is the same high pressure takeoff as in Exhibit I.

Q. Is there a valve or is there not a valve in the high pressure takeoff?

A. There is a valve in the high pressure takeoff.

Q. So that can be closed?

A. It can be closed.

Q. Is there a valve or is there not a valve in the low pressure takeoff?

A. There is no valve in the low pressure takeoff.

(Testimony of Fred A. Carpenter.)

Q. Shown on the sketch. Is there a jet shown on the sketch?

A. There is no jet shown on this sketch; just one indicated by pipes.

Q. I hand you a photograph which is labeled No. 2, June 21, 1939, and ask you if that is a photograph of the same type of pump that was furnished in conjunction with Exhibit K or not.

A. It is the same type of pump as shown in Exhibit K.

Q. How does the pump which is shown in that photograph compare in internal construction with the pump shown in Exhibit I and J?

A. Its integral parts are identical.

Q. Does that photograph show a pump casing with a high pressure discharge opening?

A. Yes, it does.

Q. Where did you get that photograph?

A. Took it from our records and files.

Q. Are those records in your possession?

A. They are.

Q. Was or was not that photograph in the file from the date that it bears?

A. It was in our file on the date shown. [218]

Mr. Mellin: I offer the photograph in evidence as next in order, Your Honor.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit L.)

(Testimony of Fred A. Carpenter.)

Mr. Bruce: May I see the photograph a minute?

Q. (By Mr. Mellin): Is this the only sale of pumps such as shown in J and I which the Berkeley Pump made prior to 1940, Mr. Carpenter?

A. No, sir.

Q. Will you tell us, please, are you in a position to know approximately how many of those pumps were sold?

A. Oh, there must have been at least 50.

Q. During what period?

A. 1937, 1938 and 1939.

Q. Do you still manufacture the pump?

A. Yes, we do.

Q. Do you or do you not still supply it for systems in which there is a takeoff of the suction?

A. We do furnish it with a low pressure discharge taken from the suction pipe.

Q. Is or is not the pump shown in I and J the preliminary design or the forerunner, or whatever you want to call it, the antecedent of the particular pump and pump casing and structure shown in Exhibit 5?

A. Yes, it is the forerunner of that pump design.

Q. Mr. Carpenter, is it not a fact that during the last 10 or 15 years there has been a steadily increasing requirement for pumps for wells of steadily increasing depth?

A. That is true.

Q. Will you tell us briefly something about that? Is that because the water table in the various countries has been lowering?

(Testimony of Fred A. Carpenter.)

A. It is partly because of the lowering of water levels in California and other points and partly because we reach farther afield in our sales and we run into conditions that call for deeper pumping.

Q. Do you now have to go to increasing depths, make equipment for increasing depths, say 300 feet, where formerly 200 feet was the maximum?

A. Yes, we are making pumps now for 300 foot depths.

* * *

(Thereupon an adjournment was taken to tomorrow, Friday, May 13, 1949, at 10:00 o'clock a.m.)

Friday, May 13, 1949, 10:00 o'clock A.M.

The Clerk: Jacuzzi Bros. vs. Berkeley Pump Company.

Mr. Bruce: Ready.

Mr. Mellin: Ready. At this time, Your Honor, with the indulgence of the court and counsel, I have a witness who has been taken away from his duties, and I would like, with the court's consent, to put him on out of turn.

Mr. Bruce: Might I interrupt? If your Honor please, yesterday, in an endeavor to speed matters along, I neglected to put in two exhibits relative to the patent notice being applied to the pump systems sold in accordance with the letters patent, and I presume, Mr. Mellin, that you would stipulate that the patent notice has been applied to the pumps

manufactured under the letters patent, the statutory notice? I assure you that it has.

Mr. Mellin: That is all right. No objection.

The Court: It is stipulated that there was affixed on the manufactured pumps the notice of the patent pursuant to the requirements of the statute.

Mr. Bruce: That is right, both patents.

The Court: Both patents. Is that agreeable, Mr. Mellin?

Mr. Mellin: Yes, your Honor. [222]

RICHARD GILMAN FOLSOM

called as a witness on behalf of defendant; sworn.

The Clerk: Will you state your name to the court?

A. Richard Gilman Folsom.

Direct Examination

Q. (By Mr. Mellin): Will you state your name, age and residence, Dr. Folsom?

A. Richard Gilman Folsom, age 42, residence Berkeley, California.

Q. What is your occupation?

A. Professor of mechanical engineering and chairman of the division, University of California.

Q. I understand that you were educated at the California Institute of Technology in mechanical engineering and have the degrees of Bachelor of Science, Master of Science, and Ph. D., is that correct?

A. That is correct.

Q. I also understand that, as you stated before,

(Testimony of Richard Gilman Folsom.)

that you are professor of mechanical engineering and chairman of the division of mechanical engineering at the University of California; I also understand that you are a Professor Mechanical Engineer of California, No. 119, is that correct?

A. That is correct.

Q. I also understand that you are a member of the executive committee of the A. S. M. E., the American Society of Mechanical Engineers, Hydraulic Division, is that correct? [223]

A. That is correct.

Q. I also understand that you are chairman of the American Society of Mechanical Engineers' Committee of Pumping Machinery, is that correct?

A. That is correct.

Q. And I also understand that you have published papers in the Technical Press, including design and performance determinations for jet centrifugal pumping system, is that correct?

A. That is correct.

Q. And I understand you were consultant for the United States Navy in the years 1941 and 1942 for the development of special submarine pumps, is that correct?

A. That is correct.

Q. I also understand you were consultant for the Ohio State University on Aerojet in connection with pumping problems, is that correct?

A. That is correct.

Q. I also understand that you have worked with the engineering divisions of the various pump com-

(Testimony of Richard Gilman Folsom.)

panies, including Byron Jackson, Western Pump, Peerless Pump Division of the Food Machinery, in connection with the design of centrifugal pumps, is that correct or incorrect?

A. That is correct.

Q. Doctor Folsom, have you read the patents in suit and do [224] you understand the construction and mode of operation of the pumping systems disclosed therein? A. Yes.

Q. That is, the patents that you have on your left, 958 and 258, Exhibits 3 and 4?

A. That is right.

Q. I hand you Italian patent No. 139,161, dated December, 1913—I can't tell the month—and ask you if you have examined that patent and understand the construction and operation of the pump therein disclosed.

A. I have examined this patent and the translation.

Mr. Bruce: If your Honor please, we would like to enter an objection to any testimony concerning the patent of 1913. No notice was given relative to this patent as required by Section 4920 of the Revised Statutes. It is flashed on us at the time of trial. A request was made by way of interrogatory for the disclosure of any patents which the defendants might use to negative invention, and no notice was given of the patent of 1913.

Mr. Mellin: May I respond to that, your Honor? At the time of trial it is slightly inaccurate to say that this patent and the copy of the translation—

(Testimony of Richard Gilman Folsom.)

The Court: I did not hear you.

Mr. Mellin: I say, to say that it is flashed on them at the time of trial is slightly inaccurate. They have had [225] a copy of it and a translation in their hands for ten days before trial or two weeks before trial. 4920, your Honor, which was adopted in 1879, provided in matters of this sort which is being argued, there had to be 30 days' notice given of proofs of this sort. However, 4920 was superseded by the Federal Rules of Civil Procedure, particularly Rule 8, B, and our Circuit Court of Appeals directly ruled that 4920 is no longer applicable, but that the Rules of Civil Procedure — and I have the authority here — the Rules of Civil Procedure control the matter of pleading.

With respect to the cases — and there are more than one of them — the one that we have in this circuit is *Crowell vs. Baker Oil Tools*, C. C. A. 9, 153 Fed. (2d) 973. In that case there was almost an identical situation. There was a motion to strike all the evidence on the ground that it did not comply with 4920, and the circuit court of appeals, through Judge Wilbur, said this: Appellant at the conclusion of the plaintiff's evidence moved to exclude from the court's consideration any of the 49 patents listed in paragraph 16 of the complaint, and the same list in plaintiff's answer to our counterclaim, on the ground that they had not been pleaded as required by the statute (USRS Paragraph 4920, 35 USCA Section 69), as patents or

(Testimony of Richard Gilman Folsom.)

printed publication, nor had they been pleaded in any way themselves as being anticipations or being pertinent in any regard to the case. The appellant specifies [226] error in the denial of this motion. It was denied. And, by the way, that motion was not renewed, and so it went off on another ground. The court said this:

“Therefore, it is unnecessary at this juncture to examine with technical nicety the allegations of the pleadings concerning these prior patents. However, it should be noted that the nature of the pleadings is now controlled by the new Federal Rules governing civil procedure in the district courts of the United States, and not by Section 69 of 35 U. S. C. A. (Patents) first enacted in 1870.”

The United States Code comments in there specifically provide that 4920 has been superseded by Rule 8B of the Civil Rules of Procedure, which make no such requirement.

Mr. Gray: If the Court please, there is apparently some conflict in the authorities. There is the recent district court case of Blanchard vs. Pinkerton, an opinion written just about a year ago by Judge Yankwich, in which he held that the notice was necessary, and cited some Supreme Court cases to the effect that this section applies. Apparently, as I look at it, this Section 4920 is more than a mere procedural statute. It is substantive law applying to

(Testimony of Richard Gilman Folsom.)

patents, and I think we have a conflict in the circuit on this question.

Also in the case of Crosley Corporation vs. Westinghouse, which was reversed on other points, states in its syllabus:

“Prior art patents and publications and alleged instances [227] of prior knowledge and use, which were not by notice given to the alleged infringer at least 30 days prior to trial, could not be urged for the purpose of anticipating or invalidating such patent, but could only be used for showing the general state of the art.”

Those cases are recent cases on the question.

And then we have the general principle that a rule adopted by a court cannot change the substantive law, and that case is the Washington & Southern Company vs. Baltimore; no rule of court can change or restrict jurisdiction nor can a rule abrogate or modify substantive law, and this is true whether the court to which the rules apply be one of equity or admiralty.

The purpose of that statute is so obvious, and it is an integral part of the law applicable to patents, and not in the case Mr. Mellin cited. In that case apparently the evidence was permitted to go in without objections.

Mr. Mellin: No, it went in with objection.

Mr. Gray: In any event, it turned on a motion

(Testimony of Richard Gilman Folsom.)

to strike. Of course, if it went in without objection, it would be too late to make a motion to strike later after it was in. But at the least, I think it resolves itself probably to a question of the discretion of the court in applying the law. This case has been pending a long time, and as I understand the facts the first notice that was given to Mr. Bruce was by a telephone conversation in which neither the name of the witness nor the [228] nature of his testimony was disclosed. Mr. Bruce asked expressly, who is the witness and what is he going to testify to?" And that information was refused Mr. Bruce. If that had been given then there would have been a lot more time, almost 30 days — 20 days anyway, and I think that fact certainly does not indicate good faith on the part of the opposing party. They could have given that much information. And your Honor will probably recall that when the question came up concerning the Italian patent here, *ex parte*, as to the production of that witness, Mr. Bruce attempted to ascertain what the nature of the testimony would be, and it was not freely disclosed, or disclosed at all, as I recall it, and I think the record here will show that it was directed more to amplifying the patent referred to in the citation of patents upon which they are going to rely.

The Court: This is not the witness whose deposition was taken?

Mr. Gray: No, this witness, however, is being asked a question concerning the patent which that

(Testimony of Richard Gilman Folsom.)

witness produced. That witness' name was Veronesi, but this witness is now being asked concerning the very patent in question.

Mr. Bruce: No, Mr. Gray, this witness is being asked a question of a patent relative to 1913. The Veronesi patent, that was referred to in the pleading, and concerning which the deposition was to be about, and as Mr. Hursh stated before your [229] Honor, the purpose of that deposition was to explain the patent. That patent that they were talking about was the Veronesi patent of 1937, as to which they had given notice in response to an oral interrogatory. This is an earlier patent.

The Court: You did not have notice until about ten days ago?

Mr. Gray: Until about ten days ago.

The Court: How many patents are you going to rely on?

Mr. Mellin: Not very many. I think five or six.

The Court: How many have you given notice of?

Mr. Mellin: I think probably all of them, but this one, which recently came to our attention. I would like to point out to the court that under any rule of law, any of the statutes, even when 4920 was in effect, the prior art patents could always be introduced to show the state of the prior art without any notice. So we are arguing about something, although I am absolutely convinced under the authorities and the statutes, that 4920 has been super-

(Testimony of Richard Gilman Folsom.)

seded by the Federal Rules of Civil Procedure. We are no longer required to plead them.

The Court: How many patents have you given notice of?

Mr. Mellin: We gave a lot of them, your Honor.

Mr. Bruce: 32, your Honor.

The Court: That is too many.

Mr. Mellin: We are relying on 9 at the most, including [230] these two Italian patents.

Mr. Bruce: At the time of the answers to the interrogatories, they said they were going to rely on all of them.

Mr. Mellin: It doesn't hurt you if I discard a lot of them. You are not injured.

The Court: I would have required you to limit the number, too. I have only felt the more patents you rely upon in anticipation, the weaker your case is, because all that shows is a lot of people try to solves their problem and did not succeed.

Mr. Mellin: Our point in citing a lot of these patents was that we had accumulated them and we tried to give them all we had.

The Court: It is not of much practical importance, because the testimony would be admissible, I suppose, to show the state of the art. But so far as the application of this section is concerned, the line between substantive and procedural law is sometimes pretty hazy. What might have been considered a very rigid necessity back in the days when the statute was adopted, in view of the voluminous

(Testimony of Richard Gilman Folsom.)

nature of patent litigation today, the desire to reform, to expedite, to streamline our procedure, I would be inclined to say that it is more procedural than substantive. Mr. Gray seemed to think it was substantive. It really has to do with the procedure substantially, because its purpose is to give the opponent a reasonable opportunity, which counsel said was 30 days in [231] the statute, to study into the patents that would be relied upon.

Mr. Mellin: The reason they were not given more notice, your Honor, on this particular 1913 patent was that there isn't apparently any copy of it in this country, and the first time it came into our hands was two days before we took this Italian's deposition. So they got it the day we took the deposition. It was not a matter of bad faith. Mr. Gray charges us with bad faith in not telling him what the witness would testify to. We did not know until he came to this country, which was three days before the deposition was taken, so we couldn't tell him except it was in conjunction with the manufacture and sale of these patented pumps. That is all we did know.

The Court: I will allow the testimony and see what it amounts to. You can reserve the right to strike if it appears it would be unfair or inequitable to allow the testimony to remain.

Mr. Gray: Your Honor, would it serve the purpose if it were admitted to show the state of the art at this time, and then in our briefs we could argue the questions of law that we discussed here?

(Testimony of Richard Gilman Folsom.)

The Court: I will just admit it, and if it appears that the admission of testimony as to the prior art, in the anticipatory phase of the matter, would be prejudicial, you can make a motion to strike and I will rule on it when I decide the case. It [232] doesn't make much difference which approach you take.

Mr. Gray: Then we will argue that as part of our argument in the briefs.

The Court: You can present the point which ever way you want to present it.

Mr. Mellin: I would like to say in that regard, however, that patents are always admissible to show the state of the prior art. Personally, I do not know the difference between anticipatory and state of the art.

The Court: Some of these things are quite technical.

Q. (By Mr. Mellin): Do you understand the construction and operation of the pump therein disclosed, Dr. Folsom? A. Yes.

Mr. Mellin: May I offer that patent in evidence as Defendant's next in order?

Mr. Gray: Our objection will be deemed to go all the way through?

The Court: You have a reservation of this point in the record.

(The patent to Veronesi, No. 139,161, was received in evidence and marked Defendant's Exhibit M.)

(Testimony of Richard Gilman Folsom.)

Q. (By Mr. Mellin): I hand you Italian patent No. 260,417, dated October something, 1927, issued to Hugo Veronesi, of Bologna, and ask you if you have examined that patent and do you understand the construction and the operation of the pumping system [233] therein disclosed?

A. I have examined this patent and an English translation, and do understand the operation of the pump disclosed.

Q. And the construction of it? A. Yes.

Mr. Mellin: I offer that patent, which is Italian patent 260,417 of 1927, in evidence as Defendant's next in order.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit N.)

Q. (By Mr. Mellin): Do you have with you the book I gave you, Doctor, including those two patents? A. Yes.

Q. Referring to that book, have you examined the Sulzer patent 704,144, of July 8, 1902, on a multi-stage centrifugal pump, and do you understand the construction and the operation of the pump therein disclosed? A. Yes.

Q. If the same question were asked you with respect to the Rateau patent, No. 730,842, of June 9, 1943, what would your answer be? Would your answer be the same or different?

A. This one also.

(Testimony of Richard Gilman Folsom.)

Q. Is the same true of Stepanoff patent 2,248,312, of July 8, 1941? A. That is correct.

Q. And is the same true or not of the Ensalin patent No. 1,494,595? [234]

A. That is right.

Q. With respect to pumping systems, have you examined the Jacuzzi patent No. 1,758,400, and do you understand the operation and construction of the device there disclosed?

A. I have examined the patent, and I do understand the operation.

Q. That is the patent of 1930, and the patent No. 2,150,799, of March 14, 1939, do you understand the construction and mode of operation of the pumping system there disclosed? Do you have that, Doctor? A. Right, and I do.

Q. Have you examined the German patent to Speck, No. 376,684, December, 1913, and do you understand the construction and operation of the pumping system there disclosed?

A. I have examined the patent, the English translation, and I do understand the operation disclosed.

Q. Have you examined British patent 382,592, to Schmid, and do you understand the construction and operation of the pumping system therein disclosed?

A. I have examined the patent, and I do understand the mode of operation of the patent disclosed.

Mr. Mellin: May I ask counsel, through the

(Testimony of Richard Gilman Folsom.)

court, at this time if they have any objection to the translations, copies of which we gave them, or should we prove them? [235]

Mr. Bruce: Did you give us copies of the translations?

Mr. Mellin: We gave you copies of the translation of the Italian patent 260 at the time of the taking of the Armstrong deposition, and we gave you a copy of the 1913 patent at the time of the taking of the deposition of Mr. Veronesi.

Mr. Bruce: No, you never gave us copies of the translations. I asked for them but they were not given to me.

Mr. Mellin: I apologize to you. I thought you had photostatic copies.

Mr. Bruce: I specifically asked for them, but they were not forthcoming.

Mr. Mellin: Do you have translations?

Mr. Bruce: We might agree that the translations might be used subject to any objection found on comparing, reserving objection and opportunity to correct them. Have you an extra copy of them?

Mr. Mellin: I am apologizing to you, Mr. Bruce, I thought at that time we gave you a translation of it.

Mr. Bruce: No, I specifically asked for that, and also I asked Mr. Hursh for them.

Mr. Mellin: We will bring you a translation of them at noon.

May I offer the Sulzer patent No. 704,144, as Defendant's Exhibit O?

(Testimony of Richard Gilman Folsom.)

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit O.) [236]

Mr. Mellin: The Rateau patent No. 730,842 in evidence as Defendant's Exhibit P.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit P.)

Mr. Mellin: The Stepanoff patent No. 2,248,312 in evidence as Defendant's Q.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit Q.)

Mr. Mellin: The Ensslin patent No. 1,494,595 as Defendant's Exhibit R.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit R.)

Mr. Mellin: The Jacuzzi patent No. 1,758,400 in evidence as Defendant's Exhibit S.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit S.)

Mr. Mellin: The Jacuzzi patent No. 2,150,799 as Defendant's Exhibit T.

(Testimony of Richard Gilman Folsom.)

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit T.)

Mr. Mellin: And the Speck patent in evidence as Defendant's Exhibit U; that is German patent No. 376,684.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit U.)

Mr. Mellin: And the British patent to Schmid, 382,592, [237] as Defendant's Exhibit V.

(The patent referred to was thereupon received in evidence and marked Defendant's Exhibit V.)

Mr. Mellin: May we mark the translations, your Honor, that appear in this book in evidence, the first Italian patent of 1913 for identification as Exhibit M-1, and the translation of patent 260,417, as N-1.

(The patent translations referred to were thereupon marked, respectively, Defendant's Exhibits M-1 and N-1 For Identification.)

Mr. Mellin: I gave you a copy of the translation of the German patent, did I not, Mr. Bruce?

Mr. Bruce: No.

Mr. Mellin: At the time of the Armstrong deposition?

(Testimony of Richard Gilman Folsom.)

Mr. Bruce: No, no translations given at the time of the Armstrong deposition. That is the very thing I was asking about, and I called your office afterwards.

Mr. Mellin: I offer the translation of the German patent as Defendant's Exhibit U-1 For Identification.

Mr. Bruce: Pardon me. That was a total of 9?

Mr. Mellin: That is correct.

(The translation of the German patent referred to was marked Defendant's Exhibit U-1 For Identification.)

Q. (By Mr. Mellin: Have you examined the various pumping systems manufactured by the Berkeley Pump Company, and do you [238] understand the construction and operation thereof, Mr. Folsom?

A. I have examined several of the systems manufactured by the Berkeley Pump Company, and do understand their operation.

Q. I call your attention particularly to Exhibit 5, which is in front of you, and ask you if you are familiar with the pumping system there shown, and know the construction operation of it?

A. That is correct.

Q. With respect to centrifugal pumps, Doctor, do you know whether or not prior to 1940 multi-stage centrifugal pumps were ones which had a low-pressure discharge from an early stage and a high-pressure discharge from a stage of higher pressure?

(Testimony of Richard Gilman Folsom.)

A. Yes.

Q. I call your attention to the book of patents which you have in your hand, and which have been offered in evidence, and direct your attention particularly to the Sulzer patent, Exhibit O, and ask you to very briefly tell us whether or not it discloses a multi-stage centrifugal pump.

A. Yes. The drawing of the patent shows a multi-stage centrifugal pump.

Q. How many stages? A. Four.

Q. Are these stages arranged in a single pump casing, or not?

A. They are in a single pump casing.

Q. Are the stages in series or in parallel? [239]

A. The stages are in series.

Q. By series we mean that the discharge from one impeller feeds into the intake of the succeeding impeller or stage? A. That is right.

Q. Then is the pump shown in the Rateau patent—are the stages stacked for operation in series with the discharge of each stage feeding directly into the next higher stage in the series?

Mr. Bruce: You are going pretty fast. We can't find these. That was Rateau what number?

Mr. Mellin: Sulzer, Exhibit O.

Mr. Bruce: Sulzer you just talked about.

Mr. Mellin: I am still asking about it.

The Court: You used another name, and that is what confused them.

Mr. Mellin: I beg your pardon. I meant the

(Testimony of Richard Gilman Folsom.)

Sulzer patent. May the question be corrected, your Honor?

The Witness: May I have the question again?

Mr. Mellin: I will re-word it.

Q. Do I correctly understand that the stages in the Sulzer patent are stacked for operation in series with the discharge of each stage feeding directly into the next higher stage in the series?

A. That is right.

Q. Will you state whether or not the Sulzer patent discloses a [240] discharge outlet for an early stage of the series?

A. It shows such an outlet.

Q. Does it or does it not disclose a discharge outlet from a succeeding stage, let us say, the last stage in the series?

A. It shows a discharge from the last stage.

Q. I notice in Fig. 2 of the Sulzer patent there is a valve control for the pump and the motors. Is that a valve control which you can selectively discharge from any of the stages of the pump, any one of them?

A. That is the purpose of the valve shown.

Q. I call your attention to the Rateau patent, 730,842, Exhibit P, and I ask you whether or not that discloses a multi-stage centrifugal pump.

A. That is correct.

Q. How many stages?

A. Two stages are shown.

(Testimony of Richard Gilman Folsom.)

Q. How many discharges does this patent disclose from this pump? A. Two.

Q. Where is the first discharge?

A. The first discharge is at Valve 37, at the end of the first stage.

Q. And the chamber at the end of the first stage is marked 33? A. That is correct.

Q. Where is located the second discharge that you refer to?

A. The second discharge is through the valve No. 38. [241]

Q. Are each of these discharges controlled by a valve or not?

A. They are controlled the valves indicated.

Q. Is the Rateau patent so constructed that both impellers can be simultaneously driven by the same shaft?

A. Under certain conditions both impellers can be driven.

Q. And it is also provided that they can be selectively driven, isn't that so?

A. That is right.

Q. Assuming both impellers are being driven in the Rateau patent, P, the suction enters the inlet of the first stage, is that correct?

A. That is right.

Q. And maintaining that assumption, would any fluid discharged from the first stage enter the inlet of the second stage?

(Testimony of Richard Gilman Folsom.)

A. The amount of fluid entering the second stage depends on the position of control valve 37.

Q. Is this a horizontal pump, Doctor, or a vertical pump?

A. This is a horizontal shaft pump.

Q. What would be the condition of the inlet opening or eye of the second stage when the pump is in operation?

A. Due to the arrangement of the discharge valve, the eye of the second stage would be maintained submerged in water at all times.

Q. What effect if any, would that have on the operation of the second stage, as far as delivering water to it?

A. In order to deliver water from the second stage, the inlet must be submerged. [242]

Q. That is from the second stage. Is that condition of submergence and delivery of water to the second stage the same or unlike the condition shown in the pump in Exhibit 5 as far as the second stage is concerned?

A. It is alike.

Q. In other words, the second stage in the Ra-teau patent and the second stage in the Berkeley pump device shown in Exhibit 5 are both fed because they are maintained submerged during the operation of the pump, is that correct or incorrect?

A. That is correct.

Q. You were speaking of quantities of discharge. How would you vary the quantities of discharge, Doctor?

A. The quantity of discharge can be controlled

(Testimony of Richard Gilman Folsom.)

and varied within the operating limits of the pump by adjustment of valves 37 and 38.

Q. Is that 35 and 36?

A. That is the outlet. The 37-38 number is on the valve.

Q. What?

A. The numbers 37-38 appear on the valve; 35-36 appear as outlets of those valves.

Q. The flange. I beg your pardon, Doctor. In the Rateau patent, Exhibit P, is there any provision for mechanically positively dividing the water which is discharged from the first stage to insure that some of the water is directed to the inlet of the second stage? [243]

A. No.

Q. Is the condition in the Rateau patent in that regard the same or different than the division of water in the Berkeley pump as illustrated in Exhibit 5?

A. It is the same condition. In other words, there is no mechanical deflector veins used in either pump.

Q. And both dependent upon having an outlet higher than the outlet of the second stage in order to deliver the water from the first stage to it?

A. The outlet is placed higher so there is a hydrostatic head placed on the section in order to keep the section submerged for operation, that is, the second stage section.

Q. That is true in the Rateau patent, Exhibit P?

A. That is right.

Q. Is that true or not true in the Berkeley pump

(Testimony of Richard Gilman Folsom.)

as illustrated in Exhibit 5?

A. It is true in Exhibit 5.

Q. With reference to that patent 285 in suit, with particular reference to the second stage of that patent, in which is the low pressure takeoff, does that patent include definite mechanical means for positively dividing the output of the second stage or not? A. Yes, it does.

Q. Would you turn to the Stepanoff patent, Dr. Folsom, Exhibit Q, which is No. 2,248,312, and would you state whether or not [244] that discloses a multi-stage centrifugal pump or not?

A. It is a multi-stage centrifugal pump.

Q. Is this what is known as a hot oil pump?

A. It is a type of pump that is used as a hot oil pump.

Q. And that is the reason for its heavy and bulky construction?

A. It is a high pressure installation.

Q. Does this Stepanoff patent and the pump therein disclosed have more than one discharge?

A. There are two discharges shown.

Q. Are those two discharges from different stages in the pump or from the same stage?

A. They are from different stages, one from the fourth stage and one from the ninth stage.

Q. So under normal operation you can take off two different pressures from the pump?

A. That is correct.

Q. Will you turn to the Ensslin patent, Doctor, No. 1,494,595, and I ask if that patent discloses a

(Testimony of Richard Gilman Folsom.)

multi-stage centrifugal pump? A. It does.

Q. Does that patent disclose discharges of fluid for more than one stage? A. It does.

Q. Then would you say or would you not say that that shows selective discharges from the various stages of the pump in the [245] Ensslin patent, Exhibit R?

A. This patent shows discharges from several stages through control valves to adjust the amounts taken off at any particular stage.

Q. You did not use the control valve in the sense that we have probably been using the control valve here as a variable orifice, did you, Doctor, when you said that?

A. Any control valve is a variable orifice.

Q. I beg your pardon. I will not get into that discussion. Will you turn to the Jacuzzi patent, Exhibit S? That patent shows what is known as a jet well pumping system.

A. Pardon me. Is that No. 400?

Q. That is right, Exhibit S. That is a centrifugal jet pumping system, Doctor, is it or is it not?

A. As indicated on the patent, this is a centrifugal type of pump.

Q. And that operates a jet from the discharge of the pump, what we have called an injector pump?

A. Part of the discharge from the centrifugal pump is used to operate the injector.

Q. Is there or is there not a water discharge from the suction line just below the intake of the pump to service shown in that patent?

(Testimony of Richard Gilman Folsom.)

A. There is a discharge line to service, which is connected in on the suction line to the centrifugal pump or the discharge line [246] from the injector pump, both being the same thing.

Q. Doctor, I call your attention to Exhibit A, and from that diagram will you state whether or not, disregarding for a moment the discharge B, which I am pointing to, you understand the mode of operation of the ssytem there illustrated?

May the witness step down, your Honor?

The Court: Yes.

Mr. Mellin: If he is like me, I would not be able to see it from there.

The Witness: Disregarding this suction——

Mr. Mellin: Yes, disregarding B.

The Witness: Disregarding B, this is a conventional type of centrifugal jet pumping system.

Mr. Bruce: Pardon me, Mr. Mellin. It is very difficult to shift around in our book of patents to find what counsel is talking about, because he is going very rapidly. I wonder if we could have just a moment to arrange our book.

The Court: Yes, we will take a recess.

(Recess.) [247]

Q. Now, do I understand that the reference to the pumping system shown on Exhibit A, with the discharge B from the low pressure discharge through B from the suction pump, do you understand the system when such a connection is made?

(Testimony of Richard Gilman Folsom.)

A. Yes.

Q. And is that substantially the pumping system disclosed in the Jacuzzi patent of 1930, Exhibit S?

A. Yes, that being Patent No. 400.

Q. Disregarding the fact that that patent is directed, as far as the patent goes, solely to the ejector.

Now, Dr. Folsom, if you move the discharge B on Exhibit A from the suction line and put it where I am dotting it on the second stage and labeling it B-1, would you say that moving it from the suction line to that second stage would impart to that system a new or different mode of operation than it had when the discharge B was on the suction line?

A. The position of the low pressure discharge does not change the mode of operation of the pumping system.

Q. Would the difference in result obtained by moving the discharge B from the suction line to the second stage as marked at B-1, be one of difference in kind or a difference in degree?

A. Well, there is one that is difference in degree, because the location of the particular output or the particular location of that nozzle depends upon the requirements needed by the particular installation. [248]

Q. And that difference would be one in the discharge pressure? A. That's right.

Q. And that would be the only difference, Doctor, or not?

(Testimony of Richard Gilman Folsom.)

A. Right. The mode of operation is the same, the discharge takeoff is located from engineering considerations to give you the required pressure for the installation considered.

Q. Now, assuming, Doctor, that the various stages of the centrifugal pump disclosed in Exhibit A are of conventional centrifugal pump design, would there be a requirement or not a requirement of a control valve or its equivalent on the discharge B-1 under normal—in other words, that the pumping system may operate in the normal commercially acceptable fashion?

A. Considering a normal multi-stage centrifugal pump, a control valve or its equivalent would be necessary in order to operate the centrifugal jet pumping system under its normal conditions.

Q. Now, however, if you modify that—strike that.

Mr. Bruce: Would you read that last answer back, Mr. Reporter?

(Record read.)

Q. (By Mr. Mellin): When you say a control valve or its equivalent, would you explain briefly what you mean by its equivalent?

A. The equivalent may be a back pressure which is created by any means; that the pressure must be controlled and the rate of flow through that section controlled in such a way that sufficient water goes to the upper stage in order to operate the jet. [249]

(Testimony of Richard Gilman Folsom.)

Otherwise the system will no longer be satisfactory.

Q. Now, calling your attention to Exhibit 5 and also calling your attention to the fact that the element 5 is a gate valve and normally wide open, but that there is a pressure labeled 5-A, what is the condition created by pressure in that tank as far as pressure within the pump itself is concerned? What influence, if any, does the pressure built up in tank 5-A have on the rise or fall of pressure within the chamber marked 8-A on Exhibit 5?

A. When the pump is operating so that there is a discharge through the valve into the tank, there is a difference in pressure between tank 8-A, or the chamber 8-A, and the tank 5-A; the difference of pressure depending upon the rate of flow through that system. However, the pressure in the part 8-A in the chamber here——

Q. 8-A?

A. ——will be controlled by the pressure that is in the tank 5-A.

Q. Because the tank fills up that back pressure and restricts the flow of fluid into it or not?

A. There is a pressure differential between these two. If this pressure is high, this one will be high; if this pressure is low, this pressure will be low.

Q. Now, would that pumping system operate satisfactorily, normally satisfactorily, if the pressure in the chamber 8-A were at atmospheric pressure, assuming that there wasn't any [250] tank or any other restriction there?

(Testimony of Richard Gilman Folsom.)

A. The pump will operate with a discharge to atmosphere, but it is not a normal or efficient, satisfactory operating condition.

Q. Now, with the arrangement shown in Figure 5, is there any possibility of starving the feeding of water to the second impeller for delivery to the jet? A. No.

Q. And that is because of the hydrostatic head of the fluid in the pumping system?

A. The discharge is at an elevation greater than that at the suction intake for the second stage, and therefore the effect of gravity is to keep the second stage submerged so that you always have this impeller completely filled, giving you the pressure which is necessary to operate the injector at the lower end of the system.

Q. And as I understood you this morning—and correct me if I am in error—that is the same method of supplying the impellers, the higher stage impellers from the lower stage impellers in the Rateau and the Sulzer patents which we discussed, multi-stage pumps?

A. That's correct, that the action in the chambers are such that the suction of the following stage is submerged so that it has water in which to operate.

Q. Thank you, Doctor. Now, except for that difference, Doctor, [251] and pointing to—strike that. Now, Doctor, with respect to Exhibit A and disregarding the discharge B-1, but again placing

(Testimony of Richard Gilman Folsom.)

the discharge B into the suction line, would you say whether or not that would be an efficient pumping operation for, say, the pumps of irrigation where you do not have to elevate the water?

Mr. Bruce: I didn't get the first, Mr. Reporter. Would you read that?

(Record read.)

Q. (By Mr. Mellin): Do you understand the question, Doctor?

A. Yes. The placing of B-1—pardon me; on the intake pipe to the centrifugal portion?

Q. In other words, having the discharge at B in Exhibit A.

A. Right. It is a satisfactory pumping system for supplying irrigation water.

Q. Would it be under certain pumping conditions where you do not have to go over low rises—you know, hills, where you do not have to raise the water too high, would it be just as efficient—change that to—would it be less or more efficient for certain conditions than if you had the low pressure discharge at the second stage?

A. If I take your question to mean as the pressure increases, as the pressure increases, it is necessary to change this outlet from its present position to a higher stage of the centrifugal pump at outlet— [252]

Q. That is, if the desired pressure is increased?

A. If the desired pressure is increased, then the

(Testimony of Richard Gilman Folsom.)

takeoff point must be at a point equal to or higher than the desired pressure. For the most efficient operation of the system, the takeoff should be at as low a point as it possible in order to meet the desired pressure.

Q. Now, applying that to the purpose of irrigation, where the field to be irrigated is no higher than the discharge B, would that be the point of highest efficiency to take the low pressure water or not?

A. It would be for irrigation purposes, where you require no pressure at the outlet.

Q. Now, Doctor, calling your attention to the Italian patent, M, do you have a copy of it in your folder, Doctor?

A. That is the 1913 patent.

Q. That is correct. A. I have a copy.

Mr. Mellin: Would you agree that this is a correct photographic enlargement, counsel?

Mr. Bruce: Well, is it?

Mr. Mellin: Yes.

Mr. Bruce: I will take your word for it, Mr. Mellin.

Mr. Mellin: May I offer the chart which I have in my hand, as M-2?

The Clerk: M-2. [253]

Mr. Mellin: May I offer that as M-2 in evidence? It is an enlargement of the drawing of the Veronesi patent, Exhibit M of 1913.

(Whereupon enlargement of Veronesi patent, 1913, referred to above, was received in evidence and marked Defendant's Exhibit M-2.)

(Testimony of Richard Gilman Folsom.)

Q. (By Mr. Mellin): Now, Doctor, would you from the enlargement of the drawing of the Veronesi patent, Exhibit M, which chart is Exhibit M-2, briefly tell us the construction of the pumping system there disclosed and the circuit which the water or the pumping circuit of the system therein shows?

A. This is a combined centrifugal jet pump, pumping system, water level located at this point in the well with a suction intake pipe coming up to the jet pump. Pressure water to drive the jet pump is supplied by this portion of the centrifugal pump which supplies high pressure water, which goes down.

Q. This portion of the centrifugal pump is marked—— A. 1.

Q. 1 on the chart, yes.

A. Which is composed of three stages. Discharging low pressure water through the pressure pipe 3, which then feeds into the jets of the injector, where it is given a high velocity; then it goes through the mixing chamber and in that process——

Mr. Bruce: Pardon me.

Mr. Mellin: Am I in the way? [254]

Mr. Bruce: You are standing in front of the drawing.

Mr. Mellin: I am sorry.

The Witness: Do you wish me to repeat?

Mr. Bruce: Yes, I didn't get that because he was in front.

A. (Continuing): We have the three stage por-

(Testimony of Richard Gilman Folsom.)

tion of the centrifugal pump indicated by 1, which produces high pressure water, which is then forced down the conduit, 3, where it feeds the jets of the injector pump. The water discharges, this high pressure water discharges from the injector at a high velocity, where it is then mixed with the water under the conditions that have taken in through the suction pump, 6; the combination of the two then being under pressure, it is then forced up the pipe, 2, where it then goes to the centrifugal pump. At this point it is then divided, part of it going to the third stage, number one portion of the centrifugal pump, where it is then recirculated. The amount of water that comes in through the suction pipe 6 then passes through the low stage portion of the centrifugal pump indicated by 8, and is discharged from the system.

Q. For use?

A. For whatever use is desired.

Q. And that discharge is labeled 8?

A. That is correct.

Q. Now, I understand from your testimony that there were two stages of low pressure and three stages of high pressure [255] indicated?

A. The drawing indicates that.

Q. And in normal engineering convention, that would indicate that the pressure to the pipe, 3, is greater than the discharge from the pipe 3 from the high pressure portion of the pump, it is greater than the pressure discharged from 8, from the low pressure portion of the pump, is that correct?

(Testimony of Richard Gilman Folsom.)

A. That is based on the indication that these stages are similar, therefore the pressure is directly proportional to the number of stages concerned.

Q. And conventionally they are indicated as being similar?

A. Conventionally shown in this diagram.

Q. That's right. Now, would you say that those stages are in series or in parallel, Doctor?

A. The three stages of the high pressure portion are in series, the two stages of the low pressure portion are in series. However, the high pressure portion is in parallel with the low pressure portion of the centrifugal pump.

Q. And that is the distinction between that, parallel and in series; in series some of the water goes through all of the stages and some of it only goes through part of the stages if you have a separate takeoff?

A. Well, in series operation the water from one impeller goes through the following ones.

Q. That is, if you have a low pressure takeoff, part of the [256] water only goes through——

A. Part of the water may only go to one or more stages, but in effect the water would go through, we will say, the first stage and succeeding stages—you may draw off a portion on the way.

Q. I notice that there is a multiplicity of jets in the jet pump here; does that change it, other than changing perhaps its efficiency, the efficiency of the system? Does that change the mode of operation?

(Testimony of Richard Gilman Folsom.)

A. The mode of operation is exactly the same. This is a mere matter of engineering proportion and design, as to whether you use a single annular or concentric or any other type of nozzle arrangement.

Q. Does that Italian patent disclose to you an operative pump structure system? A. Yes.

Q. And, Doctor, what about the efficiency of a pump of that character, where you are dividing it? Is it greater or less than if you had them in series, such as the Berkeley pump, No. 5, that you have alongside of it?

A. The efficiency is in the same order of magnitude. It depends more on the proportioning, the specific speed and other engineering features of the particular design is a consideration.

Q. In other words, that would be a matter of engineering skill, the skill of an engineer? [257]

A. Right.

Q. Thank you, Doctor. Now, Doctor, disregarding the fact that the water is divided between the high pressure and the low pressure portions of the pump in the Italian patent, M, is there any substantial difference in the mode of operation between the pumping system shown in that Italian patent and the mode of operation of the Berkeley pump shown in Exhibit 5?

A. May I have that question again?

(Record read.)

A. Neglecting the details of the arrangement of

(Testimony of Richard Gilman Folsom.)

the centrifugal pump, the pump system is the same?

Q. Now, calling your attention, Doctor, to the Italian patent, the later Italian patent, the Veronesi patent of October, 1927, which is Defendant's Exhibit N——

Mr. Mellin: This is an enlargement.

Mr. Bruce: Very well.

Mr. Mellin: And I mark this and offer it in evidence as Defendant's N-2, the enlargement of the drawing.

(Whereupon photographic enlargement of Veronesi patent of 1927, referred to above, was received in evidence and marked Defendant's Exhibit N-2.)

Q. (By Mr. Mellin): Now, you understand the construction and operation of that device disclosed, the pumping system disclosed in that patent, do you, Doctor? A. Yes. [258]

Q. Now, does that Italian patent disclose a multi-stage centrifugal pump? A. Yes.

Q. And how many stages does that patent disclose to you in that centrifugal pump?

A. Two stages are shown in section and one is indicated otherwise, making a total of three.

Q. And the first stage, what I am indicating, is that the first or some other stage?

A. This is the first stage.

Q. That I have marked by No. 1? A. Right.

Q. And this stage is what? A. No. 2.

(Testimony of Richard Gilman Folsom.)

Q. That I have marked No. 2. And this stage is what? A. 3.

Q. That I have marked No. 3. Now, does this centrifugal pump in this Italian patent have one or more discharges?

A. The drawing shows two discharges.

Q. And would you indicate them for me to mark, please?

A. One is indicated by the nozzle, 9.

Q. I will mark that 4.

A. And the other is indicated by this flange.

Q. Which I will mark 5. [259] A. Right.

Q. How do you use the word "indicated," Doctor, in your language? Do you mean——

A. Indicate, to me, I would define as the drawing shows that those are the pumps for which these elements are disposed.

Q. Now, where does the water come from which discharges through the discharge outlet 4, Doctor?

A. The convention of the drawing shows that the water coming out of discharge 4 comes from the first stage.

Q. And that is the one which I have marked 1?

A. Following stage 1.

Q. And at that point is the water divided or not divided, the intake water?

A. Well, the water passes through the centrifugal portion of the pump through the guide veins and the exit, and then into the annular space, where a portion of it goes out this outlet, the following is

(Testimony of Richard Gilman Folsom.)

guided back into the suction eye of the second stage runner.

Q. And thence to the discharge, 5?

A. No, through the third stage and then to discharge 5.

Q. And from discharge 5 it goes to the pipe, drive pipe 2? A. That is correct.

Q. And thence through the jet or whatever you call it?

A. Follows through the jet, jet 6 into the injector, through the diffuser section 7, and follows up the pressure pipe to the [260] intake portion of the centrifugal pump.

Q. Now, does that drawing, which is represented in an enlargement of Exhibit N, N-2, disclose to you as an engineer the fluid cycle of the pumping system disclosed in that patent, the fluid path or mode of operation? I will strike all of it.

Can you, from the drawing, Exhibit N, trace for us and give your explanation of how you can trace it, the mode of operation of the pumping system shown in that Italian patent N?

A. Mode of operation—if I may start where I did with the other one, at the outlet of the high pressure centrifugal pump; in other words, this case would be the outlet flange, 5, from the third stage. Where the water is under the highest pressure in the system. It is then fed to the pressure pipe leading to the ejectors. Such pressure pipes being indicated by the center line of this figure. The flow of

(Testimony of Richard Gilman Folsom.)

the hydraulic circuit being shown by the arrows indicated at this and other points throughout the drawing. The arrows indicating the hydraulic flow, the direction of flow of the fluid, and the center line indicating a symmetrical section about that line, which then the pressure water comes down, goes into the ejector, where it then mixes with the water that is drawn into the foot valve, through the diffuser action, and it is then carried up the pipe, 8, which is the discharge pipe from the injector and the inlet pipe to the suction.

Q. Wait a minute. The inlet pipe is in dotted lines? [261]

A. It is shown in dotted lines.

Q. Which I number 6.

A. In a conventional fashion.

Q. And in full in No. 2? A. That's correct.

Q. As 6.

A. So the intake pipe comes in through No. 6 to the first stage of the pump, water then passes through the first stage into the surrounding chamber, where a portion of it then goes out the discharge, nozzle 4, the remainder going to the second stage, passing through the second stage, and then into the third and back to complete the circuit.

Q. Now, do you find that circuit entirely traced by arrows on exhibit, on the drawing of the Italian patent, Exhibit N, and on the enlarged chart, Exhibit N-2?

(Testimony of Richard Gilman Folsom.)

A. The arrows indicate a complete hydraulic circuit.

Q. Thus such as you have described?

A. For the system, yes.

Q. Now, I notice what seems to be a bolt extending longitudinally through the pump at the top and bottom, to hold the various stack sections together; would you explain, please, whether or not that blocks the discharge of water from the first stage through 9 or not?

A. It does not necessarily block the discharge passage, because the drawing shows a flow passage through that portion. [262]

Q. Then as an engineer, what would that indicate to you as to the nature of the passage? Would the drawing indicate to you—what would it indicate to you as to the nature of the patent from the chamber of the first stage through outlet 9 or 4?

A. The drawing as indicated here would show that that passage would have to divide in order to pass around the bolt that is shown in Figure 2, which is the same one that is shown passing through the discharge nozzle.

(Conversation among counsel out of hearing of reporter.)

Q. (By Mr. Mellin): Doctor, I show you what appears to be a drawing of a multi-stage pump and ask you if in that drawing there is a similar bolt and boss in a discharge passage way of a pump and

(Testimony of Richard Gilman Folsom.)

indicated by the same convention as in the Italian patent on the drawing in N-2?

A. This drawing shows a similar situation mechanically, the difference being that this is a stud instead of a bolt passing through that section.

Q. Now, the difference between a stud and a bolt is that a stud has got a nut only on one end—I mean, a head only on one end?

A. A stud has threads on one end, which is then screwed into a block, rather than having a head on it. Otherwise, the nut on the opposite end is the same.

Q. As far as the passage way is concerned, that drawing which I have handed you shows the same conventional, shows by the same [263] conventional means that stud or bolt passing through a discharge outlet of a centrifugal pump? A. That's right.

Mr. Mellin: I offer in evidence as next in order, to illustrate the witness' testimony——

The Court: What is the diagram?

Mr. Mellin: Pardon, sir?

The Court: I say, what is the diagram?

Mr. Mellin: I beg your pardon. May I see it?

The Court: I mean, where does it come from?

Mr. Mellin: This is a catalogue sheet out of Sigma Pumps for Great Britain, at Gateshead, England.

Q. (By Mr. Mellin): You took it out of their catalogue, Doctor, did you? A. That's right.

The Court: Well, I mean——

(Testimony of Richard Gilman Folsom.)

Mr. Mellin: The date is unimportant, your Honor. I mean, it is drawing convention, it is not a prior art.

The Court: Well, what are you putting it in for?

Mr. Mellin: Just to illustrate the witness' testimony. There is quite a controversy, your Honor, that this used the same drawing convention to show that structure as it does in this pump.

The Court: Say that again. You said it a little fast for me.

Mr. Mellin: I am sorry. I am introducing these two in evidence to show that this manner of drawing, a bolt going through [264] a discharge outlet, is not uncommon, and that that is the conventional way of indicating it.

Q. I also show you, Doctor, a sheet catalogue of a hot oil pump, types so-and-so,—

Mr. Bruce: If your Honor please, I would like to enter an objection to this testimony, because foreign patents must speak for themselves on their face and when you have to resort to other means to interpret what a foreign patent means, you are going outside of that which is admissible, and therefore I objection to the admission of this document.

The Court: Well, I understood counsel to say that this drawing was offered, this drawing from the catalogue, was offered to illustrate—that is the way he put it—the witness' testimony. I don't know exactly what that means.

(Testimony of Richard Gilman Folsom.)

Mr. Bruce: In other words, your Honor, there doesn't seem to be anything shown on the drawing——

Mr. Mellin: In so many lines.

Mr. Bruce: ——in N-2, a passage or any means shown on the drawing an opening whereby the water passes through, discharge 4, so they resort to some other document to show what this one means.

Mr. Mellin: That is not the purpose at all. We are not resorting to other ones to show what this means, we are resorting to other documents only to show that that is the standard conventional way of illustrating this type of structure. The [265] drawing convention.

The Court: You are offering this to show that the technical people understand by that drawing——

Mr. Mellin: That it means a certain thing.

The Court: Yes, that it means a certain thing.

Mr. Mellin: Yes, your Honor, which is illustrated by the manner in which it is used in catalogues. It is used in engineering convention, which he testified this was. It is not to explain the Italian patent or to supplement it—we don't need that. But it is to explain what he means by engineering convention to illustrate his testimony.

The Court: It may be admitted for that purpose.

(Whereupon drawing No. VA9223 of the Sigma Oil Pump, referred to above, was received in evidence and marked Defendant's Exhibit W.)

(Testimony of Richard Gilman Folsom.)

Q. (By Mr. Mellin): I show you the catalogue sheet of Sigma Pump, of Gateshead, Great Britain, and I ask you if that drawing uses the same or different convention to disclose a bolt passing through the intake and discharge opening of a centrifugal pump?

A. The basic situation is the same. This is a wash drawing instead of a cross hatched.

Q. If it was a cross hatched—but the engineering convention would show that that bolt passes through the intake and discharge? [266]

A. That's right.

Mr. Mellin: I offer in evidence at Defendant's exhibit next in order, for the purpose of illustrating the witness' testimony, this drawing.

Mr. Bruce: For the purpose of illustrating the witness' testimony?

Mr. Mellin: For the same purpose, your Honor.

The Court: All right.

(Whereupon drawing in booklet entitled "Looking Forward," referred to above, depicting Sigma Oil Pump, was received in evidence and marked Defendant's Exhibit X.)

The Court: Well, what really is the purpose of the testimony is, as I get it now, while it is going in, that when a technician says, "I read this Italian patent and it discloses to me that the function is thus-and-so, that it functions in a certain way"—now to substantiate that that is right—"I want to

(Testimony of Richard Gilman Folsom.)

show you that in catalogues it is demonstrated in the same way." Is that what you mean? Why do you have to——

Mr. Mellin: Well, he said first that the arrow through here following the flow cycle was a conventional way of showing that there was a passage. He also said that this type of a drawing section was the engineering convention for showing that the passageway was on both sides.

The Court: It is sort of a collateral and cumulative——

Mr. Mellin: Just to show you what he meant by drawing [267] convention, your Honor. The engineering convention for this type of situation.

The Court: No, you are going further than that, aren't you? You are trying to prove that he is right in saying that that is the way he understands the diagram, because somebody else does.

Mr. Mellin: Well, I didn't rely on it for that purpose—just to illustrate it, the ordinary use of that convention, so that I can show it wasn't merely his opinion that that was the convention.

Mr. Bruce: Well, I think it only serves to clutter up the record, your Honor.

Mr. Mellin: Well, I think Mr. Bruce, perhaps——

The Court: Well, as far as I can see, it is going to be cluttered up, anyhow; a little more cluttering up won't hurt anything.

You don't have to rush so much, Mr. Mellin. I notice that you are proceeding so rapidly. Maybe

even the Reporter, who is very efficient, is having a little trouble. I don't mean that we have to save time by either attorney having to just push himself to the point where he can't take the necessary time to address himself properly to it. But I don't believe that it is ever proper to save time that way because you have to present whatever you want, both sides, adequately.

Mr. Mellin: I understand, your Honor.

The Court: The saving of time is involved in the [268] unnecessary types of evidence and things like that, rather than that the lawyer has to drive himself like one of those pistons (indicating).

Mr. Mellin: I understand, your Honor.

The Court: We will—this will take a little while longer, will it?

Mr. Mellin: Yes, your Honor.

The Court: I think we had better take the noon recess.

(Thereupon a recess was taken to 2:00 o'clock p.m.) [268-a]

Afternoon Session, Friday, May 13, 1949

The Clerk: Jacuzzi Brothers, Inc., vs. Berkeley Pump.

RICHARD GILMAN FOLSOM

resumed the stand.

Direct Examination
(Continued)

By Mr. Mellin:

Q. At the close of the morning session, Dr. Folsom, I showed you a centrifugal pump casing which is cut away and which was labeled Exhibit F-1 to the Veronesi deposition.

(Mechanism referred to had been placed upon small table in front of witness stand prior to adjournment.)

Q. I ask you whether or not the construction of that casing correctly physically illustrates the pump casing disclosed in the Italian patent Exhibit N, as the drawing shows that construction to you as an engineer?

Mr. Bruce: Now we would like to interpose an objection in connection with this structure. Is that the purpose, that of illustrating the witness' testimony?

Mr. Mellin: Solely.

Mr. Bruce: Well, if your Honor please, this is an attempt to bring in by indirection that which we don't believe the parties have a right to bring in by direction. He has identified a particular structure and he is trying to bring in here a silent witness in that physical form to corroborate this witness' testimony. Now, he has already put in the record two

(Testimony of Richard Gilman Folsom.)

exhibits [269] to illustrate his testimony. I see no excuse for attempting to corroborate his testimony by a physical exhibit. He has testified, and we have here, the Veronesi structure which must be interpreted from its face. He has brought in this to supplement his testimony or to illustrate it, and there are already two physical exhibits in the matter of showing how it could be done. Now he wants to bring this in, still a third physical exhibit, not for the purpose of supplementing his testimony, but of corroborating his testimony. I think it is entirely improper.

The Court: Well, what is this casing?

Mr. Mellin: This casing is a pump casing, your Honor, and, as your Honor realizes, the patent cases being highly technical and the drawings directed to engineers and not to laymen, we have found over the years that a physical structure illustrates it better.

The Court: Was this made specifically for the purpose, constructed specifically for the purpose of using it in this case, or is this just somebody's pump?

Mr. Mellin: This is somebody's pump which has been cut.

The Court: Whose is it?

Mr. Mellin: Veronesi's. Your honor, I want to limit my offer. Now,—

The Court: You want to limit it?

Mr. Mellin: I haven't offered it in evidence yet,

(Testimony of Richard Gilman Folsom.)

but I do say this, that where an engineer or one skilled in the art, to [270] whom all patents are directed, and I want to correct counsel: There isn't any difference between the varied degrees of disclosure in foreign patents; some of the cases so hold, and the late cases say that they are entitled to the same rule of interpretation as an American patent.

Now, here is a drawing that to an engineer illustrates a certain structure. Now, here to a layman is something he can see in the physical embodiment. Now, the witness has testified that to him this indicates a certain physical structure, and now I would like to——

The Court: Well, we have frequently admitted in these cases models which witnesses have testified were constructed in accordance with the teachings of a drawing in a patent, for the purpose of physically showing what the drawing teaches. That has been a permissible practice, of course.

Mr. Mellin: For the 15 years I have been practicing patent law, your Honor.

The Court: Now, if we treat this—of course, if the foundation is laid, and I don't know what the witness is going to say, but if this is a correct model of what the drawing teaches, I don't see any objection to that.

Mr. Bruce: Well, I should say——

The Court: If that is what it is.

Mr. Bruce: It shouldn't be identified as a particular pump, coming from a certain source. [271]

Mr. Mellin: Well, I made no attempt to.

(Testimony of Richard Gilman Folsom.)

The Court: Well, that was my fault; I asked counsel where it came from, more so that I could understand what this particular controversy is about a little more, and rule more intelligently upon it. But apparently——

Mr. Mellin: I wasn't going to say anything about its origin, your Honor; I wouldn't have thought it would be proper for me to do it. All I wanted to do was to use it for a model.

The Court: If you are going to use it as a model for that drawing, I don't see any objection to that; do you, counsel?

Mr. Bruce: Well, the witness has explained that the drawing—he understands the drawing, he has explained the drawing to the Court, and he has already supplemented his testimony by two other exhibits to satisfy that. Now, how far do they want to go? If they have this, it would just corroborate, rather than supplement.

The Court: I think both sides might have a justifiable doubt of my mental capacity to understand these drawings and it is true that I can, with the simple equipment that I have, understand this maybe a little bit better than I can the drawing. That is all. I don't think that any harm can come to either side by the use of so-called models.

Mr. Bruce: Well, I feel that such a model, a model such as this——

Mr. Mellin: Why, counsel, where could you get a better one? [272]

(Testimony of Richard Gilman Folsom.)

The Court: Well, I will allow it in evidence, for the purpose of demonstrating in model form the drawing, if it can be so demonstrated that it is correct, a correct model of this drawing.

Mr. Mellin: Would you read back the previous question, Mr. Reporter?

(Record read.)

Mr. Bruce: Now, I move to strike the part of that question referring to a particular deposition.

The Court: It should be deleted from the question. I think you are right about that. I think my ruling covered it, that it was admitted only as a physical model, a physical representation of the drawing, irrespective of its source.

Mr. Mellin: That's right, your Honor. I understand that fully.

Q. Would you answer that, Dr. Folsom?

A. This model is a physical illustration of the drawing in Exhibit N-2.

Q. Of the Italian patent N? A. Yes.

Q. And it correctly illustrates the construction of the pump casing shown in that drawing, does it, Doctor? A. Yes.

Mr. Mellin: I will offer that device in evidence as Plaintiff's next in order. [273]

Mr. Bruce: Just a moment. I may want to object to that.

(Device examined by Mr. Bruce.)

(Testimony of Richard Gilman Folsom.)

Mr. Bruce: If your Honor please, I would like to ask the witness on voir dire a question, one question, as a foundation.

The Court: Very well.

Q. (By Mr. Bruce): Or two questions. Figure 2 on Exhibit N-2 represents what?

A. Figure 2 on N-2 represents the second stage, the actual arrow contacts the impeller of the second stage of the centrifugal pump.

Q. Is there an impeller in this?

A. There is no impeller in this; this is the case alone.

Mr. Mellin: If your Honor please, my question is limited to the pump case. All my questions were so limited. I will stipulate that there is no impellers in that pump casing, nor shafts; no more were my questions directed to that. That is purely the pump casing, to illustrate the Italian patent, Exhibit N.

The Court: Very well.

Mr. Bruce: Well, we object to the admission upon the ground that it is incompetent, irrelevant and immaterial, that it isn't a correct representation of the structure as shown; it is only a part.

The Court: Well, it is only offered as a part, isn't that it?

Mr. Mellin: Just the pump casing, your Honor, because that [274] is what we are here concerned with—I mean, in this instance.

The Court: All right, I will overrule the objection.

(Testimony of Richard Gilman Folsom.)

(Whereupon physical embodiment of Exhibit N, referred to above, was then received in evidence and marked Defendant's Exhibit Y.)

Q. (By Mr. Mellin): Now, Dr. Folsom, would you examine the physical exhibit Y and point out to us the outlet discharge, which is 9 and 4 on Exhibit N-2, and can we mark that? And that is the one you have your hand on that I can't mark, and I will ask you that if the passageway through 9 is the passageway you referred to, which is conventionally indicated to you from the drawing of the Italian patent, Exhibit N, as enlarged in N-2?

A. That is a suitable construction to carry out the information shown on the drawing with regard to that passageway.

Q. Now, as I understand it, that passageway is not actually delineated by lines on the drawing of the Italian patent? A. It is not.

Q. Now, I will call your attention to another fact of the Italian patent, Doctor, with particular reference to Exhibit N-2; I call your attention to the fact that there appears to be an element which I am marking X on Exhibit N-2; what is that element to which I have drawn the lead line from X?

A. One of the stay bolts that pass through the case.

Q. Is that the same type of a stay bolt as is illustrated in the one I have marked XX in Exhibit 2? [275]

(Testimony of Richard Gilman Folsom.)

A. It is the same type of bolt; one passes through the nozzle 9 and the other passes through the intake nozzle, which is not designated on the diagram.

Q. And that is, is that the intake nozzle which I have pointed to, and which I am now labeling 6-A? A. Right.

Q. And does it also pass, or not, through the discharge nozzle 5 of the high-pressure side?

A. It also passes through the discharge nozzle 5.

Q. And that is what is conventionally illustrated by that drawing N-2 to you or not, that the bolt so passes?

A. Yes, it indicates that it does pass.

Q. Now, therefore, would the condition in the formation of the intake passage 6-A and the high-pressure discharge passage 5 be the same or different in physical construction than the passageway 9?

A. May I have that question again?

(Record read.)

A. The conditions for the physical construction would be the same in all passageways referred to.

Q. In other words, as I understand it, then, there would be a boss bisecting the suction passage as well as the high pressure discharge passage in the same manner that it does the passage 9? Am I correct? A. That is correct. [276]

Q. And is that illustrated on the physical exhibit that way, physical exhibit Y?

(Testimony of Richard Gilman Folsom.)

A. That is shown that way.

Q. And the physical casing, or Exhibit Y—
Strike that.

Now, I call your attention to the intake passage on the physical exhibit which corresponds to the passageway 9 on Exhibit N-2, and ask you if that construction of that passageway is the same as this drawing conventionally indicates, this drawing N-2 conventionally indicates to you as an engineer?

A. May I have that question again?

(Record read.)

Mr. Mellin: If that is unclear to you, Doctor, may I strike it? I realize it was garbled, Your Honor. May I strike it? I think I have asked practically the same question.

Q. Now, Doctor, is there anything, conventional or otherwise, in the drawing of the Italian patent as Exhibit N, as shown in N-2 that indicates, discloses or suggests that the water may come from any other point to discharge from 9 except the first stage?

A. I find no such indication on the drawing.

Q. Now, with respect to Exhibit N-2, the Italian patent N, the Italian patent M, and the drawing M-2, is there or is there not any substantial difference between the mode of operation of the two pumping systems shown therein?

A. The mode of operation for pumping in the two systems is the [277] same.

(Testimony of Richard Gilman Folsom.)

Q. Will you point out the differences in the two systems, if any?

A. The differences are involved in the arrangement of the centrifugal pumps, involved in the system. If its—in this one all fluid passes through the first stage, so that it is a series arrangement. Part of the fluid being taken off at this first stage. The remainder of the fluid passing through, returning for its drive pipe, 2—that is in Exhibit N-2. In Exhibit N-2. In Exhibit M-2, the water is separated before it passes into the impellers of the centrifugal pump, instead of after passing through the first stage of the centrifugal pump. The mode of operation, which is an increase in pressure through the action of the centrifugal pump, occurs in both of the centrifugal pumps, the difference is in the arrangement.

Q. And are both plans from an engineering viewpoint feasible or not?

A. They are both feasible.

Q. And the difference is then, as I understand it, it is a difference in question of selection of a design or not?

A. It is a matter of design on the part of the engineer, as to which way he wishes to arrange the pump.

Q. Now, when did you first see this Italian patent, Exhibit N, Doctor?

A. About the first of the year. [278]

Q. And in what manner did it come to your attention?

(Testimony of Richard Gilman Folsom.)

A. It was submitted to me for consideration.

Q. And was it submitted to you with a question for you to give an explanation of its construction and mode of operation?

A. Yes.

Q. And was any other information given to you at that time?

A. No other information of any kind was furnished to me at that time. I had no information regarding the application to which the answers to the questions might be placed, who was involved or anything.

Mr. Gray: Just a moment; if the Court please, we object to this on the ground of cross examination of his own witness.

The Court: Well, it is not cross examination. The witness is trying to establish his own impartiality, as it were. I think that there is no objection to that. At least not on the ground that it is cross examination.

Mr. Mellin: If Your Honor please, some of us patent lawyers agree with the Court, that a professional expert should be above the controversy in giving opinions, where they are partly advocates at least, and here we have a State University man, and I just wanted to show that his consideration of it was not under such circumstances as it would be if the answer was indicated to him.

Would you read the previous question, Mr. Reporter?

(Testimony of Richard Gilman Folsom.)

(Record read.) [279]

Q. (By Mr. Mellin): Now, with reference to Exhibit 5, Doctor, illustrating one of the defendant's pumps, is it ever possible to stall the pump because too much water is drawn off of the low pressure?

A. You mean by stalling the pump, getting a condition where it will not pump water?

Q. That's right.

A. In the arrangement shown in Figure 5, no.

Q. And is it or is it not the reason for that, the submerged condition of the inlet eye of the second stage?

A. That is correct. If the inlet eye is submerged in the water, due to the gravitational effect inside the chamber.

Q. I show you a diagram, Dr. Folsom, and ask you if you had seen that before.

A. Yes, I have.

Q. Does that accurately or inaccurately illustrate the flow cycle that you have described in connection with the Italian patent, Exhibit N, as represented by the drawing N-2 on——

Mr. Bruce: Now, Your Honor——

Mr. Mellin: Just let him answer and then you can object.

Mr. Bruce: I want to object before he answers, and I have a right to, Mr. Mellin, I beg your pardon.

Now, this is the same type of examination as we had before. Now, then, they are supplementing his

(Testimony of Richard Gilman Folsom.)

testimony by a fourth physical exhibit. They are still trying to bring in things to [280] corroborate his testimony.

Mr. Mellin: We are not trying to corroborate his testimony, Your Honor, we are trying——

The Court: Well, can't the witness say, "I read this drawing in such and such a way as an engineer and to illustrate the way I read the drawing, I am going to take up different parts of it, and this is the way I find the flow chart, in the flow chart is an amplification of it, as I see it, and it shows the manner in which the flow would be as taught by the drawing"? Can't a man graphically put on paper what his conclusions are as well as telling it in words?

Mr. Bruce: He has already.

The Court: I assume that is what you want?

Mr. Mellin: That is exactly it, Your Honor.

Mr. Bruce: He has already.

The Court: That doesn't necessarily prove that that is what that teaches, if you can show that that is the wrong interpretation of it or that the witness is in error. But he can put his conclusion and opinion as to what that drawing teaches into concrete form, as well as in the form of words, I would think, without violating any sound principles of evidence.

Mr. Mellin: It goes to the weight and not to the admissibility, Your Honor, I believe.

The Court: It is very difficult for the poor judge

(Testimony of Richard Gilman Folsom.)

who doesn't know anything about this. I mean, you have got all these involved diagrams, and I don't know what this diagram means. I can't exclude it on some theoretical, hypothetical basis. I wouldn't know whether my ruling would be correct or not until I hear what it is about.

Mr. Bruce: I will withdraw the objection.

The Court: And if there is something prejudicial about this, why, you can point it out, Mr. Bruce, in whatever form your argument or subsequent presentation of the matter takes.

Mr. Mellin: Well, Your Honor, what I am trying to do is to get it down graphically and fix it so that it will take but one page of the brief instead of twenty.

Would you read the last question, please?

(Record read.)

A. It does accurately illustrate the flow cycle.

Mr. Mellin: I will offer that chart in evidence to illustrate the witness' testimony as defendant's next in order.

(Whereupon chart illustrating flow cycle was received in evidence and marked Defendant's Exhibit Z.)

Q. (By Mr. Mellin): Now, Doctor, what is the part corresponding with the numbers on N-2? What is the part that I have my pencil on?

A. That is part 4.

Q. 4 and 9, 9 of the old patent?

(Testimony of Richard Gilman Folsom.)

A. Well, 9 on the patent number, 4 on the crayon number.

Q. All right. And the intake on Figure 2 of this drawing is [282] labeled 6-A; is this the correct one?

A. That's right.

Q. 6-A, intake, is that correct?

A. That's right.

Q. And 4 is a discharge, is it? A. Right.

Q. And what is this?

A. That is the high pressure discharge, which is indicated as 5.

Q. And the first stage is No. 1, the number?

A. The number is indicated as No. 1.

Q. And the last stage is No. 3?

A. No. 3.

Q. And the intermediate stage is——

A. No. 2.

Q. And the jet construction is—by the way, I was confused with Mr. Jacuzzi on it this morning—the jet pump, is that a proper term for that assembly I have just drawn the line to or not?

A. We use the term “jet pump” as indicating the whole unit.

Q. All right, jet pump—and the suction line as indicated by the numeral?

A. That is the centrifugal pump suction line.

Q. Yes, by 8? A. Right.

(Testimony of Richard Gilman Folsom.)

Q. What is the pipe I have my pencil to at this time? [283]

A. It is referred to as the drive line. That is No. 2 on the other diagram.

Q. Now, I notice that you have arrows pointing, following some sort of a pattern. What are those arrowed lines indicating?

A. The arrows indicate the direction of flow that takes place at the various parts of the pumping system.

Q. And are they substantially in accordance with the arrow system on N-2 or different?

A. They are the same.

Q. And the arrowed lines referred to, I shall mark X on Exhibit N-2.

The Court: Well, what is the advantage of chart Z, Dr. Folsom? Does it show more clearly on the exhibit? Or what have you gained in your explanation by that chart? Can you tell me that in some sort of lay manner?

The Witness: I believe it is brought out in the testimony, the actual shape taken by the discharge passage from the first case to the nozzle is not designated in the patent drawing. This drawing designates an actual physical path that takes place.

The Court: Which you say is taught by the drawing, but—it is taught by the drawing as a whole, but not——

Mr. Mellin: Not in so many lines; that is what he testified.

(Testimony of Richard Gilman Folsom.)

The Court: Not graphically shown.

The Witness: That is correct. This one, if I may, for the Court's benefit—— The lines that come up here, as clearly shown [284] in this sketch, which is almost asymmetrical, shows a flow cycle coming up and shows the passage construction in order to accomplish the flow passage as indicated, as shown by the patent.

The Court: That is the way an engineer would build it?

The Witness: That is correct; this is the way you would put this, or build this in cast iron, or however you were going to make it.

Mr. Mellin: Referring to Exhibit Z.

Q. Now, Doctor, just briefly, I show you an enlarged drawing of the German patent, which is in evidence as Defendant's Exhibit U, and——

Mr. Mellin: And may I offer the enlarged chart as U-2? I will offer it in evidence and the red figures on the chart may be disregarded, Your Honor, because they were from another witness.

(Enlargement referred to above was thereupon received in evidence and marked Defendant's Exhibit U-2.)

Q. (By Mr. Mellin): And, Doctor, would you very briefly approach the chart U-2, with the Court's permission, and tell us the flow cycle or the mode of operation of the pumping system there disclosed?

A. This describes another combination centrifugal

(Testimony of Richard Gilman Folsom)

gal jet pump, pumping system, in which the drive fluid for driving the jet goes downward through the pipe designated as P, supplying pressure water to operate the injector, the intake from the [285] well is through this section, the designation of which, I believe, is a lower case "r."

Q. Which I marked r.

A. The two fluids then combining then being pumped up through the suction pipe to the centrifugal pump.

Q. The suction pipe?

A. The suction pipe S to the centrifugal pump, where it then enters a pump which contains two stages that are being operated in parallel. There is a division of water at the suction intake such that part of it goes into an impeller, which has a larger diameter, and would then create a higher pressure, which passes out through the section I, into a pressure tank.

Q. V?

A. Correct. The other portion of the water that is divided at the pump suction intake passes through the lower pressure stage into the casing H, where it is then returned to the pipe P to drive the jet. The water taken in through the part R is then equal in quantity to the water discharged to the tank V.

Q. Is that V what we term a pressure tank?

A. Yes.

Q. And I guess that is W (indicating)?

(Testimony of Richard Gilman Folsom)

A. W is a pressure switch for automatically controlling the motor for operation of the unit.

Q. So that when the pressure in the tank drops, the system commences automatically operating?

A. Right.

Q. Now, as I understood your testimony, Doctor, here we have the reverse of the situation; we have a low pressure going to the jet and high pressure to the tank, is that correct? A. That's right.

Q. And why would there be two such systems, one with low pressure to the jet, and a high pressure to the tank, and in others they make them with high pressure to the jet and low pressure to the tank? Would you explain that very briefly?

A. The selection of the arrangement of the different elements of the centrifugal and the jet pump will depend upon the various characteristics of the particular installation. The desired pressure for the water at output, the elevation of water in the well from which you are pumping, the sizes of the pipes, the centrifugal pump characteristics and the jet pump characteristics.

Q. In other words, an engineer makes his selection to suit the conditions he meets in the field?

A. Right.

Q. Thank you, Doctor.

Now, Doctor, I show you an enlarged drawing of the British patent in evidence, Defendant's Exhibit V, and very briefly, will you tell us, please, what the cycle of operation of that device is?

(Testimony of Richard Gilman Folsom)

Mr. Mellin: And the chart that he is testifying from, I [287] will offer in evidence as V-1.

(Chart referred to above, Figure 1, was then received in evidence and marked Defendant's Exhibit V-1.)

Mr. Mellin: Would you read the question, Mr. Reporter?

(Record read.)

A. This is V-1.

Q. V-1?

A. As marked.

Mr. Mellin: May the record show it was V-1? I misquoted.

The Court: Very well.

A. This is again a combination centrifugal pump, jet pump system; in this case the centrifugal pump's stages have been separated so that they become two separate centrifugal pumps. [288]

Q. Are they driven by the same medium so that they will simultaneously operate?

A. They are both directly connected to the electric motor shown at M.

Q. Go ahead, Doctor. What is the element marked 2 on the drawing?

A. 2 is a tank which is connected to the discharge of the first pump and forms the suction to the second pump, from which the suction is taken for this second pump.

(Testimony of Richard Gilman Folsom)

Q. As I understand it, the discharge from the first pump P discharges into the chamber or tank 2 and the suction of the second pump, which is 1-S, derives its water from the chamber or tank 2, is that correct?

A. That is right.

Q. So that you have a fluid circuit between the discharge of what you would call—would you call P a low pressure pump?

A. It is the first stage, or the discharge of P is less than the discharge pressure of 2. Therefore, in that sense it would be a low-pressure pump in this system.

Q. So, therefore, you take the discharge from the low-pressure pump into the chamber 2 and the suction of the high-pressure pump connecting with the chamber 2. Go ahead.

A. The discharge from the high-pressure pump is then fed back through the line 10, which provides the pressure water for operating the injector 9, which mixes with the suction water [289] taken from the well through the suction pipe 12. After joining the two go through the discharge or the diffuser of the injector pump or jet pump; it then passes upward through pipe 4, which is the intake pipe passing to the first stage or the centrifugal pump P. The water then discharges from P into the tank 2, where we find it may be recirculated, or it may leave the tank also as through the suction 1 into the high-stage pump.

(Testimony of Richard Gilman Folsom)

Q. And where does the discharge from the high-stage pump go to?

A. The discharge from the high-stage pump feeds back to drive the jet through pipe 10.

Q. The pipe 5 is for what purpose?

A. Pipe 5 is to take off the quantity of water that is pumped by the system; in other words, the water that comes in through the pipe will then pass outward through the pipe 5.

Q. Then as I understand the system, Doctor, we have two pumps, a high-pressure pump and a low-pressure pump in the system, is that correct?

A. That is, you have two centrifugal pumps which we can designate as a low-pressure and a high-pressure centrifugal pump.

Q. The discharge of one and the suction of the other is connected to a chamber?

A. Connected to a chamber, 2.

Q. So that any water pumped by the low-pressure pump P can flow into the suction of the high-pressure pump 1?

A. I didn't quite understand that. [290]

Q. So that the water discharged by the pump P into the chamber 2 may seek by gravity to flow down through the pipe S into the suction of the high-pressure pump 1?

A. As long as the pump P-1 is pumping water, having some water in the tank, you have a gravity feed to keep the suction of the pump 1 submerged so that water is fed to 1 for continuous operation of the circuit.

(Testimony of Richard Gilman Folsom)

Q. Is that method of feeding the intake of the second pump from a fundamental principle substantially the same or different from that of the Berkeley Defendant's pump 5 so far as the feeding of the water from the first stage to the second stage is concerned?

A. They are the same in that the water leaving the first stage goes to a tank, which then keeps the suction of the second stage submerged through the action of gravity.

Mr. Mellin: You may cross-examine.

The Court: Mr. Mellin, do these foreign patents have the same longevity as patents under our system?

Mr. Mellin: They are all different, your Honor. For example, in some of the countries, like France and Mexico, they do not even make a search for novelty, and they have all different lengths of duration.

The Court: You have here an Italian, a German, and an English patent.

Mr. Mellin: That is right. [291]

The Court: How do they compare as far as their life is concerned?

Mr. Mellin: It all depends on whether you pay taxes for them. There is a yearly tax on them, and if you do not pay it, the patents are forfeited. Some of them have different lengths of life. In Argentina, depending on the fee you pay, you can get it for a longer or shorter period.

The Court: But in these countries——

(Testimony of Richard Gilman Folsom)

Mr. Mellin: I do not know the exact length of life of an Italian patent. I think it is 15 years if you pay the taxes every year. If you do not pay the taxes every year it is forfeited.

The Court: That has no bearing on the construction of American patents.

Mr. Mellin: None, whatsoever. I think it is like any other publication for that purpose: Is it new or is it old? Whether it is patented or not is unimportant. You may cross-examine.

Cross-Examination

By Mr. Bruce:

Q. Dr. Folsom, when Mr. Mellin was asking you concerning whether he had talked with you before you had made up your mind as to the meaning of the Italian patent, as illustrated in Drawing N-2, you wanted to convey to us that you were entirely unprejudiced in this matter, didn't you?

A. Right. I reached a decision by myself without any reference [292] to anything else.

Q. You are being paid for your testimony today, aren't you?

A. That is right.

Q. Afterwards you had lengthy discussions with Mr. Mellin and his associates, didn't you?

A. Only after I had presented a complete analysis of the questions that were presented to me, and any analysis that has been given in that sense is exactly as I presented on the original reply.

(Testimony of Richard Gilman Folsom)

Q. But you did have conferences?

A. That is right.

The Court: Have you ever testified before, Doctor, in any of these patent cases?

A. This is the first time, sir.

Q. This is your first experience?

A. That is right. I may add maybe it is my last.

The Court: It depends on whether the treatment you get is rough or gentle.

Q. (By Mr. Bruce): Calling your attention to Exhibit S—and you have a copy of it in your hand, have you?

A. May I ask the author of the patent?

Q. One of the Jacuzzi patents, of May, 1930. Have you ever seen this particular pump in operation?

A. In the laboratory, yes. Wait a minute. I beg your pardon. I have not seen the Jacuzzi pump in operation. [293]

Q. Well, have you seen this particular structure in operation?

A. This structure in this type of pump, yes.

Q. Identical?

A. The functional parts—

Q. Just answer my question, Doctor.

A. The identical takes in a lot of things in which a pump in the laboratory is installed. I am not certain of the actual construction of the jet, the details of it, nor the exhaust valves, nor anything else. In basic principle, in the mode of operation, yes. In all the details, no.

(Testimony of Richard Gilman Folsom)

Q. Did you have a discharge from the suction pipe as shown in the drawing?

A. Discharge out pipe 28?

Q. Yes.

A. One similar to that, yes.

Q. Discharging to atmosphere?

A. That is right.

Q. And the discharge from the high-pressure side of the pump or from the discharge line from the pump which feeds the jet, did that go to anything, or did that pipe 29 lead to a tank or something in the one that you saw?

A. In the laboratory we set these up for various conditions and various situations, which may not correspond to the field condition. This particular pump, I believe, discharged directly into a weighing tank. [294]

Q. Have you ever seen the water system of Exhibit 5 in operation?

A. I have seen Berkeley pumps in operation. Whether I have seen this exact system or not I am unable to say.

Q. Did you perform any experiments on the pump system that you had at the laboratory, such as shown in the Jacuzzi patent?

A. Which patent are you talking about?

Q. I am talking about Exhibit S, now, Patent No. 1,758,400.

A. Again your question sir?

(Question read.)

(Testimony of Richard Gilman Folsom)

A. I did not perform the experiments personally. They were performed by graduate students.

Q. Well, did you supervise those experiments?

A. That is right.

Q. You knew what was done, then. When were these experiments performed?

A. They were before the war.

Q. They were, you say, in the laboratory of the University of California?

A. That is right.

Q. Did you ever say that you had seen the structure of Exhibit 3 in operation? That is the one on the board, patent 285.

A. I have never seen this pump in operation.

Q. Did you ever see the pump system of Exhibit 4 in operation? A. No, sir, I have not. [295]

Q. What type of experiments did you perform, going back to the Jacuzzi patent, Exhibit S? What type of experiments did you perform?

Mr. Mellin: He did not perform any. He so testified. He supervised.

Q. (By Mr. Bruce): What experiments were performed under your supervision, Doctor?

A. Experiments that have been performed in our laboratory over a period of time have involved the operating characteristics of the jet pump along as a unit, the operation of the centrifugal pump as a unit, and then from those combined curves, being able to take the characteristics of the centrifugal pump and the jet pump, and developing methods so

(Testimony of Richard Gilman Folsom)

that we could predict the operating characteristics of the combined jet centrifugal pump system at any conditions of operation that might be satisfied. So that we had special installations where we would test the centrifugal. We would then test this portion, then test this portion as an independent unit. Then we would calculate for a given water level in the well, for a given pipe-line system what the overall performance of the unit should be. And then we have set up in the laboratory several special circuits of that kind to check our calculations and to see that we understood the operation of the unit correctly. And those experiments have panned out and we have been able to do that as closely as we can calculate the friction loss in an ordinary [296] pipe.

Q. In a pump of your experiment corresponding to Exhibit S, the Jacuzzi pump Exhibit S shown in the patent, you will notice that there is a valve 27 on the low-pressure discharge side.

A. Right.

Q. On the suction side of the pump.

A. Correct.

Q. Or on the suction line. What sort of valve did you use in your experiments—in the experiments under your supervision—and if I say your experiments you will understand——

A. May we assume that is what we are referring to?

Q. Yes.?

A. This was a manually-operated valve. Whether it was a needle valve, a gate valve, or other type, I

(Testimony of Richard Gilman Folsom)
do not know.

Q. In those experiments under your supervision with that structure of Exhibit 3 did the pump, when the discharge was taken from the suction line, lose prime?

A. You are asking about conditions of ten years ago, which is difficult to remember. We have operated these over all kinds of conditions. It is obvious that as this valve was opened too much, and if there is too much discharge which comes out of the suction line, you may not be able to keep the jet in operation. For this experiment I can't answer. It is too long ago.

Q. Referring to Exhibit A, concerning which you testified on [297] your direct examination, of water entering at the suction of the pump——

A. That is the suction of the centrifugal pump?

Q. Yes—is raised to the desired limit, is raised up through the stages to the desired limit of pressure desired, is it not?

A. The water at the inlet of this unit then passes through a series of centrifugal pump stages. The number of stages may be set by the discharge pressure or by the pressure required to operate the jets satisfactorily. The requirements of the jet depend upon the water level with respect to the location of the centrifugal pump and the relative rates of flow involved.

Q. But it reaches the desired pressure at the highest stage?

A. If the desired pressure corresponds to that

(Testimony of Richard Gilman Folsom)

required to operate the jet, yes, it reaches it at the outlet of the last stage.

Q. The water issuing from the pressure end of the pump, that is, through the discharge to the tank——

A. To the tank.

Q. And also the jet—that pressure is divided into two parts, is it not?

A. I am sorry, sir. You do not divide the pressure into two parts. You divide the quantity of the rate of flow. The pressure is the same at this point for the water going this way and the water going this way (indicating). [298]

Q. One of the parts goes to the service or to the pressure tank as shown there, the other part goes downward through the pressure pipe to feed the jet, is that correct?

A. Part of the water in this system goes to the pressure tank, part returns to drive the jet.

Q. That is right. I have no more questions of the doctor.

Mr. Mellin: No questions from our side of the case, and with the permission of the court and the other side, may Dr. Folsom be excused?

The Court: Very well. You may be excused. We will take a recess.

(Recess.) [299]

FRED A. CARPENTER

recalled as a witness on behalf of defendant; previously sworn

Direct Examination

(resumed)

Mr. Mellin: At the close of yesterday's session, your Honor, there was a demand for actual drawings of the pumps that were supplied in connection with Exhibit K. May I have Exhibit K, please?

(Exhibit handed to counsel by the clerk.)

Q. I hand you Exhibit K, Mr. Carpenter, and ask you if anywhere in there, on those papers, there is designated any drawings which would identify the pump that was sold at that time (handing to witness)?

A. Yes, on the invoice copy, which is our record, there is a pump drawing L-112 and also M-319.

Q. Yes. Just the two?

A. Just the two is all that is mentioned on the invoice.

The Court: What was the date of that?

The Witness: The date of this invoice is July 34, 1939.

Q. (By Mr. Mellin): I hand you what appears to be two original drawings, one marked L-112 and the other marked M-319, for 1x7½ two-stage pumps for engine or motor mounting, Berkeley Pump Company (handing to witness), and I ask you if those are the two drawings referred to by the invoice?

(Testimony of Fred A. Carpenter.)

A. Yes, those are the two drawings referred to on the invoice copy. [300]

Q. And referring to the drawing L-112, would you tell us whether or not it is, and identify that those drawings are of the centrifugal pump portion only? Is that correct? A. That is correct.

Q. And I ask you whether or not that L-112 corresponds in construction precisely with the centrifugal pump illustrated in Exhibit J?

A. It corresponds precisely.

Q. Does it have a high-pressure opening which is illustrated at A in Exhibit J, or not?

A. Yes, it has.

Q. Does it have an opening for the suction pipe to the jet pump, or not?

A. You mean the pressure pipe?

Q. The pressure pipe to the jet pump, or not.

A. Yes, it has an opening for the pressure pipe.

Q. And an opening for the suction pipe into the suction of the intake? A. Yes, it has.

Q. Are the impellers arranged in the same fashion as shown in Exhibit J, or differently?

A. They are arranged in the same fashion.

Q. In other words, the construction is identical?

A. The construction is identical.

Q. As a matter of fact, Exhibit J was made from that drawing, [301] isn't that a fact?

A. That is a fact.

Mr. Bruce: That is, the pump portion of it?

Mr. Mellin: The pump portion of it, yes.

(Testimony of Fred A. Carpenter.)

I will offer the two drawings in evidence as Defendant's next in order.

Mr. Bruce: What number is that, Mr. Clerk?

Mr. Mellin: I will offer first the drawing L-112, dated 5/26/39.

The Clerk: Exhibit AA.

(Whereupon diagram No. L-112, dated 5/26/39, referred to above, was received in evidence and marked Defendant's Exhibit AA.)

Mr. Mellin: And the drawing M-319, dated 7/17/39.

The Clerk: Exhibit AB.

(Drawing M-319, dated 7/17/39, was received in evidence and marked Defendant's Exhibit AB.)

Q. (By Mr. Mellin): Now, with respect to the construction of the pump shown in those two drawings, Mr. Carpenter, I hand you three additional drawings which are shop drawing, dated 5/24/39, marked L-109 and L-110, and L-111. I hand you those three drawings and ask you if those are the actual construction drawings of the parts of the pump shown on the drawing 112, which is L-112, which is AA in evidence (handing to witness)?

A. I would like to correct you; the drawing is L-112. [302]

Q. I beg your pardon.

A. And these are the detail drawings that go to make up the assembly L-112.

(Testimony of Fred A. Carpenter.)

Q. The drawings you are referring to now are the ones actually used in the shop to make up the pump? A. Yes.

Mr. Mellin: I offer those as one exhibit, next in order, your Honor.

The Clerk: Exhibit AC.

(Drawings labeled L-109, L-110, and L-111 were then received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Mellin): Now, Mr. Carpenter, is this for a particular size of this pump?

A. Yes, this is for a particular size.

Q. Had you made that same pump in different sizes prior to this 1939 date, or not?

A. If we made—We made one a size larger prior to this date, and I believe one afterwards that was smaller.

Q. And how much prior was the larger made, if you can recall?

A. It was a matter of months, I believe.

Q. I hand you, Mr. Carpenter, a series of documents comprising first a page with a number of calculations on it, apparently; a second letter, what purports to be a letter of April 20, 1939, from the Powers Home Equipment & Service Corporation, addressed to the Berkeley Pump Corporation; the next one appears [303] to be a carbon copy of a letter directed by the Berkeley Pump Corporation to the Powers Home Equipment & Service Corpora-

(Testimony of Fred A. Carpenter.)

tion, dated April 22, 1939; a telegram or what appears to be a telegram dated May 3, 1939, directed to the Berkeley Pump Corporation by the said Powers Home Equipment & Service Corporation; the next document is a letter dated May 3, 1939, from that Powers Home Equipment & Service Corporation to Berkeley Pump; the next appears to be a carbon copy of a letter of May 4, 1939, directed by the Berkeley Pump to Powers Home Equipment & Service Corporation; the next appears to be in the form of an invoice, but in pencil, written in handwriting, with the date on it of 5/5/39; the next appears to be a sketch in pencil of some sort labeled, "Berkeley Pump Corporation, by F.—" something—"C 5/11/39"; the next is a letter of May 11, 1939, directed to Powers Home Equipment & Service Corporation by the Berkeley Pump Corporation; the next appears to be a carbon copy of a letter to the Powers Equipment & Service Corporation, dated May 12, 1939, by the Berkeley Pump Corporation; and the next appears to be a carbon copy of an invoice of the Berkeley Pump Corporation directed to the Powers Home Equipment & Service Corporation, and dated—well, it says, "Entry date, 5/5/39," and "Shipping date 5/11/39," and that is in typing, and then that is changed by pencil, and there also are some pencil notes, Now, would you tell us if all those papers relate to particular [304] transactions, or to a particular transaction, or not (handing to witness)?

(Testimony of Fred A. Carpenter.)

Mr. Gray: If the Court please, I don't know exactly what he has there, because we didn't want to take time to read all that correspondence. But it appears evident that it is correspondence between the Berkeley Pump Company and some third person, and I am going to object to it on the ground it is incompetent, irrelevant and immaterial, and self-serving, more for the interest of saving time than anything else, because we will have to read it before it is admitted, and it may be that there is no harm in it; but it will probably take us 20 or 30 minutes to read it.

The Court: Well, you want to show plans for a pump similar to the one that you have just described that was larger, is that it?

Mr. Mellin: No.

The Court: That was made at the same time?

Mr. Mellin: No, I am showing another sale, another public use and sale of the same pump as shown in Exhibit J.

The Court: Well, why don't you just offer the invoice and have the witness testify that he got the order? You are just putting this in for the purpose of showing it is authentic?

Mr. Mellin: It is proof, your Honor.

The Court: Well, in the absence of any contrary showing, [305] you can have the correspondence marked for identification and just make the offer so counsel don't have to read all that and see whether there might be something in it.

(Testimony of Fred A. Carpenter.)

Mr. Mellin: Well, it would save time putting it in the way it is; particularly as to the authenticity, because in one of the letters is a description of the system, which is to be installed, on which there is a sketch. Otherwise, I would have the witness do the same thing that we did yesterday. The invoice has this drawing of the pump, there is a sketch on there of the system, there is a letter in there describing the requirements and the actual connection of the pipes to the pumps.

Mr. Gray: Doesn't the drawing accomplish all that?

Mr. Mellin: No, this drawing doesn't.

Q. Does the other one, Mr. Carpenter?

A. No, the drawing doesn't show the pipe arrangement.

Mr. Mellin: We have to take the transaction as a whole, your Honor, and this came out of the files of the Berkeley Pump in the regular fashion, and it would be ordinarily, if there were a real issue, unless they want to stipulate that pumps of the character shown in Exhibit A, and that systems were in public use more than one year prior to, at least, May 31, 1941—I can dispense with all of it then. If they are putting me to the technical proof, I have got to continue, your Honor. I don't think there is any question but that they were so used. But public use has to be proved right up to the hilt, your Honor, under the rule.

Mr. Gray: I make this suggestion, that if coun-

(Testimony of Fred A. Carpenter.)

sel is insisting on putting it in, that you mark it for identification, and then sometime during the trial we will look it over and see what is in it. But it certainly wouldn't be good practice for us to permit it to go in without knowing what is in it.

The Court: Well, we will mark it in identification and then you may continue with the transaction, put in the plans, and then counsel can examine it later.

Mr. Mellin: All right. May I have the bundle marked Defendant's Exhibit AD For Identification?

The Clerk: Exhibit AD.

(Bundle of correspondence referred to was marked Defendant's Exhibit AD for Identification.)

Q. (By Mr. Mellin): Now, Mr. Carpenter——

Mr. Mellin: I wanted to tell the court that I have been trying nothing but patent cases for fifteen years, and this is the first time in my experience that a court ever told me to slow down. It is always hurry up.

The Court: Well, I sort of got the impression this morning that you were propounding your questions fast because of something that I may have said, indicating a desire to expedite it. [307]

Mr. Mellin: No, your Honor, it is just from the force of habit of trying these cases and having the courts hurry us up, in patent cases.

(Testimony of Fred A. Carpenter.)

Q. (By Mr. Mellin): I hand you Exhibit AD For Identification and ask you where those papers came from (handing to witness).

A. These papers came from the files of the Berkeley Pump Company.

Q. And, if you know, were those letters, the original letters in there, received in the regular course of mail on or about the dates they bear?

A. Yes, they have.

Q. And were the originals of the letters which appear to be carbon copies of letters duly mailed to the addressee on about the dates that they bear?

A. Yes, they were.

Q. Now, I call your attention to an invoice. Will you tell us, is that an invoice of the Berkeley Pump Company?

A. That is an invoice of what we called then the Berkeley Pump Corporation.

Q. All right. That is one of the defendants here?
Mr. Bruce: No.

A. Yes, one of the defendants.

Q. (By Mr. Mellin): Well, you were connected with that corporation?

Mr. Bruce: The Berkeley Pump Corporation isn't a defendant. [308]

Mr. Mellin: Well, you have got so many defendants, I can't even tell.

Q. But it is all right, it is the Berkeley Pump Corporation it is a predecessor of the present defendant, and would you tell us, please, is that in-

(Testimony of Fred A. Carpenter.)

voice for a pump of a particular design and character?

A. Yes, this invoice is our record, one of our records, of a particular pump made for a particular purpose.

Q. And that invoice was rendered on or about the date it bears, the original of it?

A. Yes, sir.

Q. Does it call for, or does it designate, the pump by drawing numbers or some other identification?

A. Yes, it has an assembly drawing number C-107.

Mr Mellin: Do you have any objection to the blueprint rather than the original, Mr. Bruce?

The Witness: Pardon me, the original is here.

Mr. Mellen: I know.

Mr. Bruce: No, I don't.

Q. (By Mr. Mellin): I show you a drawing which is dated 5/5/39, numbered L-107; does that illustrate the pump which is designated on that invoice (handing to witness)?

A. Yes, it does.

Q. And is that pump any different in construction than the pump, as far as the centrifugal characteristics are concerned, [309] than that pump which is shown in Exhibit J?

A. No difference.

Mr. Mellin: I will offer that drawing in evidence as Defendant's next in order.

(Testimony of Fred A. Carpenter.)

The Clerk: Exhibit AE.

(Drawing No. L-107, dated 5/5/39 received in evidence and marked Defendant's Exhibit AE.)

Q. (By Mr. Mellin): Now, Mr. Carpenter, the exhibit for identification which you have in your hand, AD For Identification, does that include a sketch or a diagram of a pumping system?

A. There is included with the papers a sketch dated 5/11/39. It doesn't show the entire pump, but it does show the pipes going down to the jet and it shows a discharge coming out of a tee and other discharge coming out from the side of the pump.

Q. Can you tell us anything about the sketch, who made it?

A. The sketch was made by myself.

Q. When was it made? A. 5/1/39.

Q. And is that the sketch of the system which you sold under the invoice which you just referred to? A. Yes, sir.

Q. And is there a description of that system in one of the letters accompanying in Exhibit AD For Identification?

A. There is at least a partial description.

Q. In what letter, please, so we may identify it?

A. The letter of May 4, 1939, describes the pump briefly and it describes the conditions under which it is to work.

(Testimony of Fred A. Carpenter.)

Q. And does that provide that there is to be a high-pressure discharge, or not?

A. Yes, that has a paragraph covering a method of discharge from the pump.

Q. Now, from that description in it and the sketch, would you say or would you not say that the system there is the same system as shown in Exhibit I, with the exception that there is a low-pressure discharge from the suction line that I will indicate in dotted lines in Exhibit I, and label X (marking,) or not. [311]

Mr. Bruce: Did you include in your question the red?

Mr. Mellin: No. May the record show that the part on Exhibit I marked in red may be totally disregarded for the purpose of this question.

Q. Mr. Carpenter, does it include a low pressure discharge from the suction?

A. It includes a low pressure discharge.

Q. From the suction?

A. From the suction.

Q. The high pressure discharge from the highest stage of the pump?

A. Yes, from the highest stage of the pump.

Q. Thank you, Mr. Carpenter. Now, Mr. Carpenter, with respect to water pressure systems such as we have been discussing in general, have you ever seen a water pressure system, that is, of the jet pipe, having a jet at the bottom and a centrifugal pump of one or more stages at the top in a pressure

(Testimony of Fred A. Carpenter.)

tank in which the pressure in this system is equalized promptly, and immediately that water was drawn off of any part of the system?

A. No, I never did.

Q. Is that an inherent characteristic of such systems?

A. That is referring to the jet pipe pressure systems?

Q. The jet pipe pressure systems.

A. In jet pipe pressure systems it is necessary that water equalize when they stop because it must be filled with water [312] clear down to the foot valve.

Q. So that in all systems the whole system is full of water, isn't it? A. Yes.

Q. And when you draw water from the system, if there is a storage tank, it equalizes back into the pump? A. Yes.

Q. And when the pressure drops below the setting of the automatic switch, the pump commences to operate? A. That is right.

Q. That is an inherent condition in pressure systems for how long, to your knowledge?

A. All centrifugal systems for as long as I can remember. To make a distinction, plunger pumps that do not need to be primed——

Q. I am talking about jet pipes, you understand, centrifugal pumps.

A. Jet pipe pumps have always equalized pressure.

(Testimony of Fred A. Carpenter.)

Q. How long have you known of such systems?

A. Since 1925.

Mr. Mellin: Cross-examine.

Cross-Examination

By Mr. Bruce:

Q. Mr. Carpenter, I would like to show you the circular exhibits which are in evidence. I will show you the circular exhibits, Defendant's Exhibit F, Exhibit 12, 13, 14, [313] 15, 16, 17 and 18, and ask you if those are publications of the Berkeley Pump Company or the partnership defendant.

Mr. Mellin: We already stipulated to that, Your Honor, and they are already in evidence. I see no point in encumbering the record.

The Court: That is admitted.

Mr. Bruce: That is stipulated.

Q. Did you assist in the compilation of those circulars and documents which you hold in your hand? A. Yes, I did.

Q. They portray the various products of your company, including those of Exhibits 5 through 9?

A. I believe they do, yes.

Q. Can you tell me the earliest date? Which exhibit was the first published? A. Of these?

Q. Yes, of those. Which was the first published?

A. I believe this one we call Bulletin 500.

Q. When was Bulletin 500 published, if you know?

A. I don't recall exactly, but I know it was a

(Testimony of Fred A. Carpenter.)

pre-war piece of literature, so it must have been about 1940.

Q. Of the other circulars, excluding the installation instructions, which was the first one published? Was it Bulletin 501, Exhibit 12?

A. I am quite sure that is correct. [314]

Q. And when was that published?

A. I think it was 1944.

Q. 1944? A. Yes.

Q. Is that the first publication that you have illustrating the pump system shown in Exhibit 5?

A. It depends upon what you mean by publication. We have blueprints of a pump like that a little earlier.

Q. I mean publications which provided for a circular among your customers and distributors.

A. That is right. This is the first one.

Q. And do you fix that at 1944? A. 1944.

Q. Mr. Carpenter, you are the Mr. Carpenter that is the patentee that was cited as part of the prior art, 2,280,626? A. Yes, sir.

Q. That is a water system in which a discharge is taken from a suction pipe, is it not?

A. I don't understand you.

Mr. Mellin: If Your Honor please, if I may try to shorten this, this is rather outside the scope of the direct examination. Here is another type of pump manufactured by Berkeley Pump known as the turbine pump, which has nothing to do with the subject under inquiry here.

Mr. Bruce: It was pleaded. [315]

(Testimony of Fred A. Carpenter.)

Mr. Mellin: It was pleaded, but we haven't offered it in evidence.

Mr. Bruce: I will connect it up, Your Honor.

The Court: Very well.

Mr. Mellin: May I have the objection on the ground it is immaterial? It was pleaded, but not offered.

Mr. Bruce: I withdraw that question.

Q. That is a pump system in which the pipe leads to the impeller stage of the pump system, does it not?

A. You say a pipe leads to the impeller stage of the pump?

Q. Yes. You have an impeller stage in the pump, haven't you? A. Yes.

Q. And a pipe leads to that, doesn't it?

A. Yes, a discharge pipe leading to that impeller case.

Q. Now, then, there is a discharge below the impeller stage, is there not?

A. Yes, that is a dual discharge pump.

Q. It is a dual discharge pump, not from the casing, however, is it not?

A. Yes, both come from the casing.

Q. Does it come from the impeller stage, from that part of the casing which develops the pressure for the pressure tank?

A. There is one discharge leading from what we call a booster case and a discharge of lower pressure that comes from what we just call the case. [316]

(Testimony of Fred A. Carpenter.)

Q. There is a pressure system connected with it, isn't there? A. Yes, there is a pressure tank.

Q. And there is a check valve in the discharge line to the pressure tank, isn't there?

A. Yes, there is.

Q. And that is the way such a pump is sold, isn't it? A. That is right.

Q. Was the pump system shown in Exhibit K designed by you?

A. I lost track of Exhibit K. May I see a copy of it?

The Court: That was that 1939 sale, the first one that you testified to.

Mr. Mellin: That is the pump in Exhibit I and J.

The Witness: Will you repeat the question, please?

(Question read.)

A. It was designed partly by me and partly by Ralph Rhode.

Q. (By Mr. Mellin): That is not the pump embodied in the Rhode patent, is it? A. No.

Q. (By Mr. Bruce): Did you know Mr. Rachele Jacuzzi? A. Yes, I knew Rachele Jacuzzi.

Q. In what connection? You worked for him, didn't you? A. I worked for him a short time.

Q. Your work was connected with pumps, was it not?

A. To a limited degree. I worked on helicopters, turbine pumps, and a little bit on jet pumps, very little. [317]

(Testimony of Fred A. Carpenter.)

Q. You stated yesterday in your testimony, as I understand it, that you considered the features of the pump sketch shown in Exhibit K as unique. Do you recall stating that?

A. Yes, it was a unique installation.

Q. A unique installation? A. Yes.

Q. What did you consider unique about it?

A. That the pump was to deliver water to a low level open tank and to a high level tank. The well was of very poor capacity. The idea was to pump into the low level tank until it was full, and then by the mere opening of a valve, the water would be withdrawn through the same suction, the same pipe that delivered the water into the low level tank would then become a suction pipe, and the water would go out through the pump into the high level tank.

Q. And that is what you considered unique?

A. Yes.

Q. When did you first offer to the public the pump systems illustrated in Exhibit 5?

A. About the middle of 1940.

Q. About the middle of when?

A. Publication, you say?

Q. No. When did you first offer to the public the pump system? A. Early in 1942.

Q. 1942, about the middle of 1942? [318]

A. That is right, I think it was the early part of 1942. I am not certain.

Q. When did you offer the pump system illustrated in Figure 6 to the public?

(Testimony of Fred A. Carpenter.)

A. If you are referring to that exact construction, that was 1944. If you are merely referring to a pump of the same flow cycle——

Q. I am asking you specifically with respect to Exhibit 6, the same pump system shown there.

A. The same pump system?

Q. Yes. A. 1942.

Q. When did you first offer the pump system of Exhibit 7 to the public?

A. That being a three-stage pump, I know it was not offered until 1944.

Q. When did you offer the pump system of Exhibit 8 to the public?

A. I am not certain as to that without looking up records whether it was 1942 or 1944.

Q. When did you offer the pump system of Exhibit 9?

A. I am not sure on that one either, whether in 1942 or 1944.

Q. In other words, there was no offering to the public prior to 1942? A. Not of that type.

Q. When did you first start to manufacture and offer to the public multi-stage pumps?

A. In the early part of 1937. You are referring to my company. You are not referring to me personally, but to my company, Berkeley Pump Company.

Q. What was the date?

A. 1937 was the first that the Berkeley Pump Company made.

(Testimony of Fred A. Carpenter.)

Q. These multi-stage pumps as such were old when you started in business, weren't they?

A. What is that?

Q. Multi-stage pumps were old when you started in business? A. Oh, yes.

Q. Does the turbine pump of your patent that you were just referring to, 2,280,626, which was cited in the pleading—what is the advantage of that pump over the pump system shown in Exhibit 5?

A. It pumps a much larger quantity of water at zero pressure at the surface or open discharge.

Q. Do you consider that a more advantageous pump in the matter of delivery than the pump of Exhibit 8?

A. This is a deep well pump and Exhibit 8 shows a shallow well pump. We try to match pumps according to the conditions that we find in the field.

Q. You readily convert the pump, the water system of Exhibit 8 to deep well pumping, don't you?

A. Yes, that is true. [320]

Q. In other words, you sell it as a pump which can be readily converted? A. That is right.

Q. In selling the injector unit, the injector assembly, you sell that portion, too, do you not?

A. That is right.

Q. And you give instructions as to how it may be installed? A. Yes, sir.

Q. So that a person buying the pump system of Exhibit 8 could readily convert it into a deep well pumping system? A. That is right.

(Testimony of Fred A. Carpenter.)

Q. By the way, how do you ship the pump system of Exhibit 8? A. How do we ship them?

Q. Yes, how do you ship them?

A. In a crate by a regular carrier.

Q. Is the suction pipe attached or separate?

A. Oh, it is not attached, no.

Q. When you sell the deep well pump system, pump system of Exhibit 5, you ship it in a crate with the injector assembly separate, don't you?

A. That is right.

Q. In other words, these pumps are very readily convertible from shallow well to deep well pumping?

A. That is right. [321]

Q. And you advocate in your literature that a person can really save the price of one pump by buying one pump since it is so readily convertible.

A. I think I understand your question, but I would like to have it read.

(Question read.)

The Court: You mean save the price of two pumps.

Q. (By Mr. Bruce): Yes, save the price of two pumps.

A. It is not exactly that, but we do mention the fact that if the water is shallow level and they buy our shallow two-stage pump, they can later buy the deep well jet assembly for a nominal sum and they will have a deep well system without throwing the whole thing out.

(Testimony of Fred A. Carpenter.)

Q. You advocate that in your sales literature?

A. Yes.

Q. And in your distribution of your pumps, do you not?

A. We have done that for years—since 1937.

Q. When did you first produce the turbine pump in your patent that we have discussed?

A. Without looking up the record, I would only guess. We started late in 1939 or early 1940.

Q. And your first distribution of pumps and pump systems, or first sale of the exhibit 5 through 8, was subsequent to early 1942, or starting with early 1942?

A. That is right. [322]

Q. In Exhibit 5 in this system you take the pressure discharge from the low pressure side of the pump unit, do you not?

A. That is the way it is arranged, yes.

Q. This is an advantage, isn't it, since you do not have to raise the water required by the consumer up to the pressure required by the jet?

A. That can be considered an advantage in some cases, yes.

Q. What is the advantage of doing that? There is a definite advantage, but will you explain what the advantage is?

A. Well, if a customer only requires 20 pounds pressure and you need 40 pounds to run the jet, there is no particular advantage in raising the pressure clear up to 40 pounds and cutting it back to the valve, but still there is another advantage in

(Testimony of Fred A. Carpenter.)

our particular construction that there is air present in the water, it can rise from that chamber and separate out, instead of going back on through the impellers and jet and tending to unprime it.

Q. You get the same advantage in Exhibit 3, don't you?

A. Except we do not have that priming advantage.

The Court: You do not have the what?

Mr. Bruce: The priming advantage.

Q. But you do get the advantage that you do not have to raise the water up to the pressure required by the jet and take it off the consumer use at that pressure; you take your consumer discharge off at an earlier stage of the pump, don't you?

A. That is a minor advantage but not a very strong one.

Q. It effects a saving in power bills, doesn't it?

A. To a very limited degree.

Q. But it does effect some saving?

A. To a very limited degree.

Q. Referring to Exhibit 8, you have a system where, if you open the low pressure discharge 12 while the unit is not running, the automatic switch will start the motor and the system will operate, won't it?

A. Water will flow from the tank through the piping, through the pump and out valve 12 until the pressure gets down to 20 pounds, and then the motor will start.

(Testimony of Fred A. Carpenter.)

Q. The same think will occur in Exhibit 3, won't it?

Mr. Mellin: Just a moment, Your Honor. In the first place, I do not know whether this witness is familiar with the operation of Exhibit 3. He is not a patent expert by a long way. Even Mr. Jacuzzi did not know how his own patent worked. I do not know how he expects Mr. Carpenter to know.

The Witness: That operated about the same way, Exhibit 3.

Q. (By Mr. Bruce): You as a pump man understand that figure, don't you, that drawing?

A. Yes, fairly well.

Q. What particular advantage do you get out of that?

Mr. Mellin: Out of what?

The Witness: Out of the low pressure discharge feature? [324]

Q. (By Mr. Bruce): Yes.

A. Well, when we advertised, we thought it would be quite an advantage, the fact that a man could irrigate with low pressure water and still maintain pressure on the tank, similar to the way we do it with our small turbine pump, but actually it has not proven very popular and we do not even recommend them that way any more.

Q. If you were carrying this to a discharge at a distance, and you opened, the pressure would automatically drop in the system and when it dropped

(Testimony of Fred A. Carpenter.)

below the minimum requirements upon which the switch would turn in, your system would start to operate, wouldn't it?

A. Sure, the same thing would be true of any pipe line coming from the pressure system. If you open the valve a mile away, the pressure would fall.

Q. That is true of this type of system in Figure 8?

A. This type or any type of system.

Q. In Exhibit 5 all the pressure from the high pressure side of the pump goes to operate the jet, does it not?

A. Within its range, yes, sir.

Q. In this case, when you installed the pump system, you did not have to make any adjustments affecting the high pressure side of the pump?

A. No, I do not quite follow your questioning, but we do not make adjustments to the high pressure side of the pump anyway. [325]

Q. You do not need any control valve affecting the adjustments of that pump in the installation?

A. We at times need a control valve on the tank.

Q. Does that control valve have an effect during the operation of the system?

A. Yes, whenever a customer wants to take a large volume from the pipe direct and irrigate with it, we recommend that he throttle it and keep the pressure at 20 pounds. That is indicated in our instructions.

Q. You recommend that the gate valve shown in the discharge to the pressure tank in Exhibit 5

(Testimony of Fred A. Carpenter.)

should not be used as a control valve in your literature, don't you?

A. We like to have that wide open.

Q. You leave that wide open?

A. And if there is going to be any control on the tank or the system, we prefer to have it on the discharge from the tank. There are obvious reasons for that. We want the air to be free to go through a large opening of the tank instead of being pinched through a small opening, which would be the case if it was being used as a control valve.

Q. You advocate that the control valve at all times should be left wide open, don't you?

A. We advocate that the gate valve be left wide open.

Q. The gate valve should be left wide open and no control valve is necessary in your system? [326]

A. In most cases, no, because the natural back pressure on the tank operates the necessary control to keep the pressure up.

Q. In the setup of your system in its manufacture you employ a standardized casting for your pump unit case, don't you?

A. We do that on all our line of pumps as far as it is practicable.

Q. On all the line of pumps from 5 through 9 you use a standardized casting in your design, don't you? A. We call it standard.

Q. They are uniform, are they not?

(Testimony of Fred A. Carpenter.)

A. Small pumps have a little smaller casting than the larger pumps.

Q. Mr. Carpenter, for pumps of the same capacity or size. A. The same size, yes.

Q. In Exhibit 7, you have not changed the basic casting any, have you?

A. We have added a casting.

Q. Will you step to Exhibit 7? Take this pencil and show the casting part that you have added. I wish you would take and cross section it so the court can see what you have added.

A. Do you want it cross hatched, or solid?

A. Cross hatched, please.

A. I think that covers it all, sir.

Q. Will you mark that part with a lead line A? Now, if we term the part of the casting in Exhibit 5 for the unit of the pump, the pump unit, a basic casting, you provide the same openings in all the basic castings, don't you?

A. I think I understand what you mean. This casting is the same as this one, and this casting is the same as this one. Is that what you mean?

Q. That is right, and the openings for various discharges are all the same, aren't they? In some of them you will have plugs, but the openings in the original castings are all the same?

A. All the same sizes, you mean? [327]

Q. No, all in the same positions.

A. I guess so. I can agree with that.

Q. You have an opening for the suction line of

(Testimony of Fred A. Carpenter.)

the pump, you have an opening for the pressure line of the pump, you have an opening in Figure 5—and I am pointing to Figure 5—you have a plugged opening there which can be used for discharge to service, and you have an opening which leads to the pressure tank, and the same openings appear in all your castings?

A. Yes, I would say so.

Q. And those openings are for the purpose of converting the systems for various purposes?

A. That is right.

Q. You said a while ago that you got pressure equalization in all pressure systems.

A. Of the jet type pressure systems.

Q. In other words, you do not have pressure equalization in your jet type system, do you, or in your turbine type system?

A. You can, or you can have it one way or the other. The pressure comes off from the turbine if you put a check valve between the turbine and the tank, or you can have it with a foot valve at the bottom and no check valve, and have pressure equalization in the turbine, also.

Q. But you do not sell them in that manner, do you?

A. We sell most of our turbines with the check valve between [328] the pump and the tank.

Q. That is the way you advertise and sell it?

A. Yes.

Q. If you took the check valve out what would

(Testimony of Fred A. Carpenter.)

happen, so far as the pressure tank is concerned? I am talking about your turbine pump as disclosed in your patent, that we talked about a little while ago.

A. As far as regular operation is concerned, nothing would happen. We have a certain reason for having that check valve in position.

Q. Wouldn't the water drain out of the tank?

A. No, because we have a foot valve at the bottom, also.

Q. Is that automatically started? A. Yes.

Q. There is no means shown in the patent, however, for doing that, is there? A. Oh, yes.

Q. For automatic starting?

A. Yes, there is a pressure switch, pressure gage.

Q. Where is the pressure switch shown?

A. At No. 11.

Q. How does that effect turning on the motor when you open the discharge for irrigation?

A. It will not effect automatic operation from this low-pressure discharge unless you also open a valve in the tank. [329] That is even taken care of by having a manual switch to turn on the motor with direct.

Q. In your pump system of Exhibit 5 water enters the first stage of your impeller in the casing from the suction pipe; it is discharged into the low-pressure chamber of the pump, the low-pressure side of the pump. It then is discharged into the intake of the second impeller.

(Testimony of Fred A. Carpenter.)

A. That is right.

Q. And a part of the discharge of the low-pressure, on the low-pressure side goes to service.

A. That is right.

Q. Now, the discharge to service is at a point higher than the intake of your second impeller, isn't it?

A. Yes, this point marked 8-B is higher than the impeller.

Q. Assume in Fig. 36 of Exhibit 5 we take the discharge at point A from the casing. Will your second stage receive an adequate amount of water during the operation of the system?

A. No, if the discharge point is large enough to take all the water delivered by the first stage of the impeller, naturally there won't be any water left for the second stage.

Q. In effect, what you do, you design to construct the casing of your pump in such a manner that the discharge to service from the low-pressure side of the pump is always at a higher point than the intake of the second impeller?

A. Why, yes. [330]

Q. In other words, your construction is such as to favor the second impeller?

A. I guess that is as good a way to put it as any.

Q. Don't you find the same condition existing in Exhibit 3? In other words, is not the discharge at high-pressure which feeds the jet favored over the low pressure?

(Testimony of Fred A. Carpenter.)

A. No, I would say the thing was reversed.

Q. You would say it was reversed. You would say in that case that you did not insure the feeding of the jet, but the favoring would be to the low-pressure discharge?

A. Yes, if full open throat.

Q. Comparing that with Exhibit 4, in that case do you have a favoring of the discharge to the jet?

A. Without going into details I would say no. Going by gravity alone it would appear obvious that the water would flow out discharge 77 and go up to the next stage of the impeller.

Q. Well, as the water enters from the suction line, it enters the first impeller?

A. That is right.

Q. Let us disregard the first discharge. It then goes to the second impeller. From the second impeller it divides and goes to the pressure tank and to the highest impeller, and the design of the pump is such that there is always enough water to operate the jet delivered by the last impeller?

A. I would say no. [331]

Q. Have you ever seen this construction in operation? A. No, I can't say that I have.

Mr. Bruce: I think we will introduce the Carpenter patent that the witness has been talking about.

The Court: Any objection?

Mr. Mellin: No objection.

(Testimony of Fred A. Carpenter.)

The Court: Mark it in evidence.

(The Carpenter patent referred to was received in evidence and marked Plaintiff's Exhibit 19.)

The Court: Mr. Bruce, are you going to be much longer with this?

Mr. Bruce: I may be.

(Discussion with respect to length of the case, after which an adjournment was taken until Monday, May 16, 1949, at 10:30 o'clock a.m.) [332]

Monday, May 16, 1949, 10:30 o'Clock A.M.

The Clerk: Jacuzzi vs. Berkeley Pump.

Mr. Bruce: Ready for the plaintiff.

Mr. Mellin: Ready.

* * *

FRED A. CARPENTER

recalled; previously sworn.

Cross-Examination

(Continued)

By Mr. Gray:

Q. Mr. Carpenter, in addition to being president and acting as an engineer, you also act as general manager of the Berkeley Pump Company, is that right? A. That is right.

Q. The same is true, is it not, with the predecessor companies, that is, the partnership and the old

corporation: you [333] always acted as the managing head? A. That is right.

Q. As part of your work, Mr. Carpenter, as general manager, and also as the designer of pumps, it is common practice for you, is it not, to completely familiarize yourself with the type of pumps manufactured and sold by competitors in the field?

A. Yes.

Q. And you do not remain oblivious to what the other pump manufacturers are doing, do you?

A. Oh, no, not at all.

Q. In that connection it is common practice for you and other people in this same business to obtain circulars and catalogs published and distributed by other people in the same business, is that true?

A. Yes. As a matter of fact, a good many of them we exchange.

Q. It is a sort of courtesy or reciprocal arrangement, and you keep files on the circulars of various pump companies that illustrate the types of pumps that they manufacture and sell, is that right? A. Yes, to a certain degree.

Q. Mr. Carpenter, I will show you a bulletin or circular entitled, "Presenting King Pump." It has Jacuzzi's name on it and it is marked "Copyright in 1941, Jacuzzi Bros., Inc.," and ask you whether you have ever seen this or a similar circular before?

A. I cannot say that I have seen this particular circular. I [334] have seen circulars somewhat similar.

Q. Maybe I can refresh your memory, Mr. Car-

(Testimony of Fred A. Carpenter.)

penter, if I may take that, please. I will call your particular attention to the next to the last page, where the pump entitled, "Jacuzzi Double Discharge Pump Performs the Impossible; No Control Valve Required," is illustrated. That refreshes your memory, does it not?

A. I have seen a cut of this particular pump, if that is what you mean.

Q. You saw that, did you not, in the latter part of the year 1941?

A. I would not say as to that.

Q. You do not recall whether that is the correct date? A. No.

Mr. Gray: May I have this marked for identification?

(The document referred to was thereupon marked Plaintiff's Exhibit 20 for Identification.)

Q. (By Mr. Gray): Mr. Carpenter, I show you the Jacuzzi catalog—this is Plaintiff's Exhibit 11——

Mr. Mellin: What is the date of that, Mr. Gray?

Mr. Gray: I am coming to that, Mr. Mellin. It is catalog No. 142, copyrighted 1941 by Jacuzzi Bros.

Q. I ask you whether you have ever seen that particular catalog, or one similar to it.

A. Yes, I am pretty sure I have seen this. [335]

Q. As a matter of fact, Mr. Carpenter, you

(Testimony of Fred A. Carpenter.)

have one or more of those catalogs in your file, have you not?

A. Yes, I am quite sure we have.

Q. You received that catalog in the latter part of 1941, did you not?

A. I am not sure when we received one.

Q. It may be I can refresh your memory if I call your attention to the contents. I will call your attention to pages 30 and 31, in which the deep well injector pump series DR Multi-stage is illustrated, no control valve required. Does that refresh your memory as to the time?

A. That does not help a bit on the time.

Q. It does not? A. No.

Q. May I call your attention to pages 32 and 33, where the Jacuzzi Dual Discharge Pumps are illustrated, Multi-stage Dual Discharge? Does that refresh your memory?

A. Not particularly.

Q. It does not. All right. Thank you. May I call your attention to pages 34 and 35, Jacuzzi selective stage discharge pumps, no control valve, appears and the pump is so illustrated. Does that refresh your memory, Mr. Carpenter, as to when?

A. No, it does not. After all, 1941 was the start of the war, and it has been quite a while ago.

Q. Events were rather confusing during that time. Do you know [336] how many of these catalogs came into your possession? I am referring to Plaintiff's Exhibit 11.

(Testimony of Fred A. Carpenter.)

A. It so happens I don't keep the file. I have someone else that does that. I glance at them and pass them on.

Q. You familiarize yourself with the contents of catalogs of that nature, do you not, as a pump operator and designer of pumps?

A. To a very limited degree. I do not concern myself too much with what competitors are doing, because we are always busy with our own developments.

Q. In your own developments, don't you, as general manager of the pump company, compare your developments with those developed by your competitors?

A. We compare final results, of course.

Q. Do I understand that you do not compare the various modes of operation illustrated in catalogs with your own?

A. As a matter of fact, our development in the engineering department, pattern shop, lagged so far behind our ideas that we did not have to reach out very far to keep ourselves very busy through designs.

Q. Mr. Carpenter, aside from these catalogs, you have seen the pumps illustrated in that catalog that I have just shown you, pages 30 to 35? You have seen the actual pumps, have you not?

A. You mean out in the field in operation? [337]

Q. Any place.

A. I couldn't be sure, but it wouldn't be neces-

(Testimony of Fred A. Carpenter.)

sary for me to see them. If I saw the catalog I would know how they worked right away.

Q. Do you have any recollection of seeing the pumps?

A. No. Of course, from a distance you see them in a store window, or something like that.

Q. I take it when you saw them in a store window you paid no particular attention to them; kept going?

A. I know there were lots of them. They were doing good business.

Q. Calling your attention to September, 1941, during that month, did your company exhibit pumps at the State Fair in Sacramento?

A. December?

Q. September, 1941.

A. I am not sure whether that was the year we skipped or the year before. We skipped one year in there pretty close.

Q. That matter was discussed in your deposition. Didn't you refresh your memory on it, whether it was, or not?

A. I didn't try to refresh it very hard. I think the fact was borne out. Whether it was 1940 or 1941 I am not sure.

Q. You are not sure whether your company exhibited the pump in 1941, is that right?

A. That is right.

Q. Do you have any recollection as to which of your employees [338] or officers were in charge of

(Testimony of Fred A. Carpenter.)

any exhibit during the month of September, 1941? I assume, however, if you do not know whether you exhibited, you would not know that, would you?

A. Generally, our Mr. Loughenberg had charge.

Q. Mr. Loughenberg—that was his prerogative usually? A. Yes, the sales manager.

Q. What is the nature of his connection with your company? A. He is sales manager.

Q. An officer also of the corporation?

A. That is right.

Q. What is his office?

A. He is vice president.

Q. Do you know whether or not any of your salesmen attended the Fair of 1941?

A. If it was held in 1941, probably every salesman attended the Fair.

Q. Did you visit the Fair in 1941?

A. Yes, I probably did, if it was held in 1941.

Q. And you looked at your own exhibit there, didn't you? A. Oh, yes, of course.

Q. Do you know whether Jacuzzi had an exhibit there at the same time?

A. Yes, they had one.

Q. Do you know where the Jacuzzi exhibit was with reference to your exhibit? [339]

A. Yes, they usually hold theirs in the same place every year.

Q. I meant where was it physically with reference to yours?

(Testimony of Fred A. Carpenter.)

A. Across the other side of the pool and up a little way from ours.

Q. In rather close proximity, was it?

A. Fairly close.

Q. And you had occasion, did you not, to walk by their exhibit?

A. That is just about it, walk by. That was about all.

Q. Did you notice who was in charge of the exhibit in Jacuzzi's?

A. Well, generally Mr. Jacuzzi was there part of the time.

Q. Mr. Ansoni? A. Perhaps Mr. Ansoni.

Q. You knew him quite well?

A. That is right.

Q. I take it you walked by and did not stop to discuss pumps or any subject with him?

Mr. Mellin: If he recalls.

The Witness: Not particularly. We talked about other things.

Q. (By Mr. Gray): While you were talking about other things you diverted your eyes away from the pumps there, did you?

A. They all looked the same to me—multi-stage pump, a single stage pump, and a few others.

Q. Didn't the multi-stage pump you saw there have more than one [340] discharge?

A. I couldn't say.

Q. Did the multi-stage pump that you saw there, Mr. Carpenter, resemble the structure shown in Plaintiff's Exhibit 3?

(Testimony of Fred A. Carpenter.)

Mr. Mellin: When was this?

Mr. Gray: September, 1941.

Mr. Mellin: He says he doesn't know whether it was 1940 or 1941.

Mr. Gray: Let us find out.

A. Why, yes. It looked something like that.

Q. (By Mr. Gray): Looked something like Plaintiff's Exhibit 3. All right. When did your company commence manufacturing and selling pumps containing more than one impeller stage? And by "your company," Mr. Carpenter, I mean the existing company or the partnership or the old corporation. Sometimes I refer to you. I refer to them, too.

Mr. Mellin: Your Honor, we are getting into where the second counsel is going to review what the first counsel asked.

The Court: Yes, this was gone over.

Mr. Mellin: He testified in 1937, 1939.

Mr. Gray: 1937. That is all I wanted. You have answered it for me, Mr. Mellin. Thank you.

Q. Prior to 1942 when you started manufacturing and selling the pump systems described in Plaintiff's 5 to 9, inclusive, you obtained your low-pressure discharge from taking it off [341] the suction line, is that right? A. Yes.

Q. At any time subsequent to the time that you commenced offering the pump system described in Plaintiff's Exhibits 5 to 9, did any of your catalogs describe a dual discharge injector pump

(Testimony of Fred A. Carpenter.)

where one of the discharges is taken off the suction line? Do you understand the question?

A. Yes. I do not think so.

Q. In other words, you stopped showing them in your catalog or publications from the time you started to manufacture and sell these pumps, Plaintiff's Exhibits 5 to 9; that is right, isn't it?

A. As a matter of fact, none of our pumps showed two discharges. Anybody who wanted a separate discharge, it was a special job, not shown in the catalog.

Q. After you started showing these pumps 5 to 9, you did show the dual discharge in those, and that was the time you started showing dual discharge pumps in your catalog, is that right?

A. That is right. [342]

Q. As a matter of fact, the pump that you have described, where one of the discharges is taken off the suction line, follows the general structure and mode of operation of the Jacuzzi patent, is that right? You are familiar with that.

Mr. Mellin: Your Honor, I think that question is highly improper.

Mr. Gray: If he knows.

Mr. Mellin: Read the question again, please.

(Question read.)

Mr. Mellin: Your Honor, whether it follows a prior patent or not is not in point. We have gone over this structure.

(Testimony of Fred A. Carpenter.)

The Court: I will sustain the objection.

Q. (By Mr. Gray): Mr. Carpenter, prior to 1942 did you ever manufacture and sell to the public any injector type pump systems with service discharge other than from the point of highest pressure as illustrated in Exhibit J and from the suction line as shown in that exhibit? Can you see at this angle? A. Yes.

(Question read.)

A. I think I understand your question. The answer is no, we did not, when you consider the complete injector type deep well pump.

Q. That is what I had reference to.

A. We had other pumps that had two discharges but not deep well. [343]

Q. Those we have gone over already.

A. Yes.

Q. Mr. Carpenter, prior to 1942 did you ever manufacture and sell to the public any injector type pump system having a discharge from an impeller stage at a pressure lower than the stage supplying the injector?

A. No, I do not believe we did.

Mr. Gray: That will be all, Mr. Carpenter. Thank you.

Redirect Examination

By Mr. Mellin:

Q. Mr. Carpenter, you were asked a considerable

(Testimony of Fred A. Carpenter.)

number of questions with reference to the Carpenter patent, Plaintiff's Exhibit 19. That is a turbine pump, isn't it? A. That is right.

Q. By the way, you still manufacture that line of pumps?

A. Oh, yes, we manufacture them.

Q. As a matter of fact, the difference between that type of pump and the type of pump that we are considering here is the difference in the respect of what use they are put to, isn't that correct?

A. Yes.

Q. I understand these systems we have been discussing, such as shown in Exhibit 5, are principally for household use and of low capacity; let us say 20 gallons per minute?

A. Yes, their capacity varies from 10 to a maximum of 50 or 60. [344]

Q. And the type of pump that is shown in the Carpenter patent, Plaintiff's Exhibit 19, is for capacities of 150 gallons a minute and more, is that correct?

A. That is right, a hundred gallons or more.

Q. A hundred gallons or more per minute, and that becomes the irrigation type of pump, as I understand.

A. Yes, that is the irrigation feature of that particular turbine pump.

Q. So you get a larger quantity?

A. A large capacity. The pressure may be similar to the capacity of the jet pump.

(Testimony of Fred A. Carpenter.)

Q. In other words, in an analogy with trucks, that would be doing the job of a five-ton truck, whereas the type shown in Exhibit 5 would be comparable to the pickup truck in a line of trucks?

A. That is right.

Q. As I understand it, that pump is more expensive in original cost, is that correct?

A. Yes, in original cost.

Q. And less expensive per gallon of water produced?

A. Oh, yes, much less.

Q. It would be like if you interchanged that one for this, it would be using a Cadillac for a Ford's job; so that we have two different fields of use between your turbine pump and these household water systems. [345]

Mr. Gray: We will stipulate to that. I do not think you have to go further.

Mr. Mellin: Mr. Bruce seemed to make considerable point about this.

Mr. Gray: He was just illustrating similarity in mode of operation as far as the discharge is concerned.

Mr. Mellin: He was making some other point than that, Mr. Gray, which he will argue rather strenuously on his brief. [346]

Q. What I hand you, Mr. Carpenter, is a modern Berkeley pump catalogue, Bulletin 801, which is descriptive of the uses and function of the turbine pump we have been discussing.

A. That is right.

(Testimony of Fred A. Carpenter.)

Mr. Mellin: May I offer that to illustrate his testimony as next in order, Your Honor?

(The bulletin referred to, No. 801, was thereupon received in evidence and marked Defendant's Exhibit AF.)

Q. (By Mr. Mellin): You still make single stage jet systems, don't you, Mr. Carpenter?

A. That is right.

Q. Which have only one discharge from the highest pressure? A. That is right.

Q. That suits another need, doesn't it?

A. That is right.

Q. That is, a need lesser than 5? A. Yes.

Q. That is still a standard part of your line?

A. Yes.

Q. Then you have another pumping system which pumps up, as I understand, to 3,000 gallons per minute? A. Yes.

Q. That suits still another line?

A. We have four lines for deep well pumping. They all overlap to some extent. [347]

Q. But they are all generally for a particular purpose. What happened to the pump development or manufacture of pumps by Berkeley, say, after December, 1941? I mean generally when the war started. I mean continued pump development. I mean for commercial use. Were you restricted at all, or what happened?

A. We were restricted—we were requested at

(Testimony of Fred A. Carpenter.)

least to streamline our operations, cut out new pump developments, put out the fewest models possible, and to streamline operations. Furthermore, we were restricted by quota. New developments practically came to a standstill until the war started to taper off.

Q. At that time did you build submarine pumps for the United States Navy?

A. That is right.

Q. Referring to all of these various exhibits for identification, 5 to 9, I believe, considerable question was raised about a uniform casting with all of these holes. For that particular type of pumping system you make, 5 to 9, is it more economical to make one pattern and one pump casting?

The Court: Mr. Mellin, wasn't that gone over?

Mr. Mellin: Yes, I have just one question to ask, Your Honor, with your indulgence.

The Witness: Yes.

Q. (By Mr. Mellin): Just make it brief. That is so that pump casting can be adapted to all varying conditions?

A. Sometimes I think they are so full of holes that they are [348] Swiss cheese, for plugs and all of that.

Mr. Mellin: That is all.

Mr. Gray: That is all.

Mr. Mellin: At this time, Your Honor, I should like to read into the record the deposition of Mr. Veronesi of Boulogna, Italy. It isn't very long. It is about forty pages.

May we follow the usual procedure, Your Honor? I will read the questions and someone will give the answers.

The Court: Can you state to me what the gist of the deposition is?

Mr. Mellin: Yes, the gist of the deposition is this, that Hugo Veronesi, who was a patentee of both of the Italian patents that we have been discussing, including the one 260,417, and the earlier 1913 patent, the deposition will show that he commenced manufacturing pumps in exact accordance with patent 260,417 somewhere in the neighborhood of 1923 and manufactured and sold them continuously in Italy until 1939, at the start of the war. The deposition also identifies certain publications illustrating these pumps which were made in accordance with the patent. The deposition will also show that the pump casing which is before Your Honor was one of the pump casings brought over from Italy, which was made some time prior to 1939. It was put together in that fashion to bring over. There were parts lying around the plant. It will also show that these pumps Eureka, as they are called by Mr. Veronesi—by the way, we have actual sales records of them here and drawings showing the construction and manufacture of those pumps made and the uses to which they were put, identical with that shown in the patent—it is for this purpose, Your Honor: it is for the purpose of showing that this prior Italian patent was a system of practicality and was actually manufac-

tured and sold. It was not a prior publication or patent which was dug out of ancient history and disinterred for the purpose of this case, which is a thing that counsel argued loud and long, why the practice has developed, to show the state of the art in connection with the prior patent. The purpose of the deposition is not to amplify, supplement or describe the prior printed publication but to show it was a live thing and had commercial success and was practicable.

Mr. Gray: If Your Honor please, whether a device had commercial success or whether anything was manufactured in Italy is immaterial, incompetent and irrelevant to the issue here. It is fundamental in the matter of patent law that a prior use or prior construction of a thing in foreign country is not a bar to the issuance of a patent here unless the patentee here knew of this at the time he made his invention, and therefore the only purpose or ground on which that would be competent at all would be in an endeavor to show what the patent drawing meant. Certainly it is incompetent for any other purpose.

(The matter was argued and a recess taken until 1:45 p.m.) [350]

Afternoon Session, March 16, 1949

Mr. Bruce: We were concerned with a stipulation pertaining to the deposition. Mr. Mellin's offer is to establish that the pump of the patent is an operate structure. Now, we will stipulate that defendant's interpretation of the Veronesi 1927 patent as illustrated in the dimensional drawing, Defendant's Exhibit Z, will operate as a pump system.

Mr. Mellin: That doesn't help us. I mean that would be begging the question entirely. I want to show not only it was an operative structure, but I will show that the exact pump of the patent operates.

The Court: Perhaps we had better go ahead with the deposition.

Mr. Mellin: I think so.

The Court: Are there any objections to the form of the questions that are of any consequence that I need to rule upon, or is the main objection the one of the admissibility of this kind of evidence?

Mr. Mellin: I think it is, your Honor, because we stipulated that all objections were reserved except those as to form.

Mr. Bruce: The form of the question was not objected to.

The Court: Are there any rulings that I would have to make in the course of the reading—

Mr. Mellin: Other than that, I don't think so,

or other than their general admissibility, though Mr. Gray seemed to [351] indicate otherwise.

The Court: Because if that were the case, then I think it would be unnecessary for you to read it, because whether you read it or not I would have to read it later—I can't carry that all in my mind—reserving the objection as to the admissibility of the testimony in general.

Mr. Gray: We take the position, your Honor, that the witness here—I think we should clear this up—that while his name is Veronesi, he is not the patentee.

Mr. Mellin: He is a son.

Mr. Gray: He is a son of the patentee; that questions were asked of him in this deposition concerning his opinion as to the mode of operation and other questions that would require an expert to answer. We take the position that in this deposition there is no showing that he is qualified to answer them.

The Court: Let's go ahead and read the deposition.

Mr. Mellin: May it be done in the usual way, by putting one on the stand to read the answers?

Mr. Gray: No objection.

The Court: Is there an original I can follow?

Mr. Mellin: May the record show that the interpreter was duly sworn and that the witness was duly sworn through the interpreter.

Just a moment, your Honor, there is some question existing [352] about the interpreter. I used

“he” instead of “you.” Counsel has no objection to us changing them as we go along?

Mr. Bruce: We have no objection.

(The deposition of David Veronesi was there-upon read into evidence.) [352-a]

Mr. Mellin: There is no cross-examination.

Mr. Layne.

WILLIAM ROBERT LAYNE

called on behalf of defendant; sworn.

The Clerk: Will you state your full name?

A. William Robert Layne.

Direct Examination

By Mr. Mellin:

Q. Will you give your name, age and residence, Mr. Layne?

A. William Robert Layne, 67 years old, Orinda, California.

Q. What is your present occupation?

A. I am retired.

Q. Have you had any previous experience with centrifugal pumps? A. Yes, sir.

Q. For how long a period of time?

A. Most of the time for some little over 55 years.

Q. And I understand that between 1918 and 1924 you were associated with the Standard Oil Company, is that correct? A. Yes, sir.

(Testimony of William Robert Layne.)

Q. And what was your capacity and what were your duties at that time?

A. Most of that time I was engineer specialist at the Richmond refinery in charge of steam and hydraulic problems and particularly pumps and all that has to do with them. [353]

Q. I understand also that you were educated as a mechanical engineer at the University of California, although you did not graduate?

A. Right.

Q. Now, I also understand that between 1918, you were with the Byron Jackson Pump Company, subsequent to 1924?

A. Most all of that time, yes, sir.

Q. During what period were you with Byron Jackson, Mr. Layne?

A. From 1918 until—with the exception of about a year, I mean, from '24 to about '35.

Q. And what was your occupation with Byron Jackson and your duties at that time?

A. I was what they called an engineering, sales engineer, working with the oil companies mainly.

Q. Doing what, particularly with reference to any particular subject?

A. The pumping of oil with centrifugal pumps.

Q. When did you leave Byron Jackson?

A. 1935.

Q. And where did you go then?

A. Back to the Standard Oil Company.

Q. And then you stayed there from 1935 until 1947?

A. Right.

(Testimony of William Robert Layne.)

Q. And what were your duties and what was your position with the Standard Oil Company during that period? [354]

A. I was in the main engineering department as an engineer specialist in sole charge of pumps and pumping problems.

Q. So you have had all, during that time, practical experience in the design and manufacture of centrifugal pumps? A. I did.

Q. And between 1916 and 1918, as I understand it, you were engaged directly in the manufacture of rotary pumps? A. I was.

Q. And did you have anything to do with Standard Oil's pumping problems, such as problems with the Arabian Oil Company? A. I did.

Q. Would you tell us in just a sentence what your duties were in that regard?

A. My duties were to make the specifications for pumps and examine bids and pass on any orders that were made in the refineries and pipelines of Aramco, Arabian American Oil Company, as well as Standard Oil.

Q. Now, have you examined Italian patent No. 260, which is Defendant's Exhibit N, in evidence?

A. I have.

Q. And do you understand the construction and operation of the pumping system disclosed in that patent? A. I do.

Q. And at the time that you examined it, did you determine from the patent itself the construc-

(Testimony of William Robert Layne.)

tion and mode of operation of the [355] pumping system therein? A. I did.

Q. Did you require any additional information other than supplied by the patent itself?

A. No, sir.

Q. Now, will you tell us briefly, please, how many discharges does the centrifugal pump have which is shown in that patent? A. Two.

Q. Now, the first discharge is the one which I point to on Exhibit N-2, 9, or not? A. Right.

Mr. Bruce: If Your Honor please, I think the witness ought to testify rather than for the attorney to point out on the drawing and say, "Is this so-and-so?" In other words, he puts the words right in the mouth of the witness, what he wants him to testify to.

The Court: Well, I imagine that counsel is perhaps doing it——

Mr. Mellin: To shorten time, Your Honor.

The Court: ——in his desire to save time. I am sure he didn't put the witness on without having talked to him first, and he knows what he is going to say.

Mr. Bruce: That is probably true.

Mr. Mellin: I would be awfully stupid if I didn't have.

The Court: Well, why not ask him to point it out?

Q. (By Mr. Mellin): Would you point out the two discharges on [356] Exhibit N-2?

(Testimony of William Robert Layne.)

A. No. 9.

Q. That is what discharge, the first discharge?

A. That is the first discharge. And on your exhibit I believe it is No. 5——

Q. On N-2 is the second discharge?

A. Yes, sir.

Q. Now, where does the first discharge, No. 9, receive its water? From where?

A. From the first stage runner.

Q. And is that labeled on Exhibit N-2?

A. That is No. 1, I believe.

Q. No. 1 in pencil. And where does the second discharge, from where does the second discharge receive its water?

A. From the third stage, No. 3, I think there.

Q. Does the drawing of the Italian patent, which is enlarged in Exhibit 2, clearly disclose such a construction to you as an engineer in a practical manner or not?

A. Let's see. Which is No. 2?

Q. This is N-2, this drawing.

The Court: You had better read that.

Q. (By Mr. Mellin): Does the drawing N-2——

A. Oh, yes, I see; yes, sir.

Q. Does that clearly disclose to you as an engineer such a construction as you have just testified to? [357]

A. Oh, yes.

Q. And would you state from your experience as

(Testimony of William Robert Layne.)

an engineer and in manufacturing pumps that that drawing utilized the ordinary drafting methods of disclosing that construction?

A. Almost completely.

Q. Now, except for the fact that you have testified there is a discharge No. 9 eliminating that factor as the remainder—and that there is a passageway from the first stage out through 9, is the remainder of the pump of conventional or unconventional construction? A. Conventional, at that time.

Q. Would you explain that just briefly?

A. The earlier multi-stage centrifugal pump was developed in Europe and were constructed as shown in this section drawing.

Q. With the stay bolts running through?

A. With the stay bolts running through parallel to the shaft.

Q. Now, I show you an exhibit which you have seen before, which is labeled Defendant's Exhibit C. You have examined that drawing, Mr. Layne?

A. Yes, sir.

Q. Now, does that or does that not correctly illustrate construction of the centrifugal pump, such as you have testified to, having the construction you testified to, in connection with Exhibit N-2 of the Italian patent? A. That's correct. [358]

Q. And the casing in front of you, which is labeled Exhibit Y, is that a correct physical representation of what the drawing in N-2 illustrates to you? A. Yes, sir.

Q. By the way, what are the orders of pressure

(Testimony of William Robert Layne.)

which are developed within centrifugal pumps of the character used in home water systems, such as these?

A. Well, a little home water pressure system might be as much as 40 or 50 pounds.

Q. Are you familiar with hot oil pumps?

A. I am.

Q. In which they use double casings?

A. Yes, sir.

Q. Now, what was in the order of internal pressure of such pumps?

A. Oh, that might be as high as a thousand pounds.

Q. Per square inch? A. Yes, sir.

Q. And the ordinary centrifugal pump used for pumping systems of this sort, what order would the internal pressure in those pumps be?

A. Well, pumps such as this might be as much as—depending on speed and diameter of the runners—it might be as much as 250 or 300 pounds.

Q. Now, you said, as I understood you, that when you were with [359] the Byron Jackson Company, you were connected with farm installation, the installation of farm pumping systems?

A. Somewhat, but—

Q. Somewhat. Now, would you say that an ordinary pump, for commercial use,—that is, commercial irrigation—a pump that didn't produce more than 25 gallons per minute, would you say that that was adapted for commercial irrigation?

(Testimony of William Robert Layne.)

A. No, generally speaking, I would say not.

Q. What would you say the minimum requirements for a commercial irrigation pump per minute would be?

A. That is debatable, but I would say 150 gallons a minute, perhaps.

Mr. Mellin: Your witness.

Mr. Bruce: May we take a short recess, Your Honor?

The Court: Do you wish a recess?

Mr. Bruce: Yes, Your Honor.

The Court: We will take a short recess.

(Recess.) [360]

Cross-Examination

By Mr. Bruce:

Q. Mr. Layne, you are not under subpoena here today, are you? A. No, sir.

Q. You are being paid for your testimony?

A. I hope so, yes, sir.

Q. Well, I hope so, too. Now, I would like for you to step up to the drawing, or step down to the drawing Exhibit N-2, which is an enlargement of the Veronesi patent of 1927, and point out on that drawing, if you can, any showing of a completely open flow path through the pump unit from the suction end of the pump. Do you understand the question? A. I do.

Q. From the suction end of the pump. Start with the suction end of the pump.

(Testimony of William Robert Layne.)

A. The suction end is here.

Q. (By Mr. Mellin): Is that 6?

The Witness: Fixed?

Mr. Mellin: The suction is 6?

A. Yes, sir. Well, that is the suction end, yes.
The suction is right in here.

Q. (By Mr. Bruce): That is behind——

A. This broken line shows the suction flange on the back of the pump, or on the front of the pump.

Q. I see; all right. Just go ahead. [361]

A. And the liquid goes from the runner out into the case, here. A portion of it goes out as indicated by the arrow.

Mr. Mellin: Through 9.

Mr. Bruce: Just a moment, Mr. Layne.

Mr. Mellin: Let him answer. You asked the question.

Q. (By Mr. Bruce): Just a moment. You say it goes out there, and you passed it through a structure? A. Oh, no. Oh, no.

Q. Well, I am asking you to show on the drawing where that appears.

A. Yes; give me a chance. It goes right around this boss which connects across here. The bolt goes through that. The water goes around it here and here. That is not used in modern practice very much.

Q. There is no open path shown on the drawing from the first stage out to the discharge 9, is there?

A. Well, the draftsman forgot to put in a couple of dots on there.

(Testimony of William Robert Layne.)

Q. He forgot; it isn't shown?

A. No, it isn't shown, but it wouldn't fool anybody that knew his stuff, either.

Q. In other words, you interpret that in that manner, do you? A. Oh, yes.

Q. That is your interpretation?

A. Absolutely. [362]

Q. Well, now, follow your interpretation on through the pump unit.

A. Well, I would interpret that the water comes from this runner, goes around through this vane, down into this runner, around through the diffusion vane, here, and similarly through the third runner.

Q. The third runner isn't shown?

A. No. The casing is shown.

Q. You are assuming that that is there?

A. Oh, yes, you are justified in assuming that.

Q. Could that be chamber at that point?

A. It is a chamber. It has a runner in it, and diffusion vanes.

Q. Then where does it go to?

A. Then it would come out of this opening, here, which would be here.

Q. The "opening here"—will you give it a number? A. It is numbered 5 here.

Q. No. 5. That would be the discharge from the mouth of the pump?

A. Well, I wouldn't call it the mouth; I would say discharge from the third stage.

Q. Discharge from the final stage?

(Testimony of William Robert Layne.)

A. Right.

Q. That goes then where?

A. That then is the liquid that actuates your jet pump and [363] goes through your tube to the jet pump.

Mr. Bruce: I see. That is all.

Mr. Mellin: No further questions.

The Court: That is all of the witness?

Mr. Mellin: That is all.

The Court: Oh, by the way——

Mr. Mellin: Just a moment. I didn't mean all my witnesses; I don't want to ask any more questions.

The Court: Did you ever testify before in a patent case?

A. No, sir.

Q. First time you have ever testified?

A. Yes, sir.

Mr. Mellin: If your Honor please, at this time counsel for the defendant were going to decide if they had any objection to Exhibit M-1 for identification, the translation of Italian patent No. 139,161; to N-1, which is a translation of Italian patent No. 260,417, and Exhibit U-1, a translation of German patent No. 376,684. At this time I would like to offer these translations which have heretofore been marked for identification in evidence.

The Court: Very well. Let them be marked.

Mr. Bruce: I have had a chance to compare the

two Veronesi patents. I haven't had a chance to check the translation of the German patent. [364]

The Court: Well, if you want to offer a different translation you may do so.

(Exhibits M-1 for Identification, N-1 for Identification and U-1 for Identification were thereupon received in evidence.)

Mr. Mellin: I would also offer at this time—this was only offered for identification—Exhibit AD, which was the evidence of a sale of a pump by the Berkeley Pump Company to the Powers Home Equipment Company.

Mr. Bruce: What was that, Mr. Mellin?

Mr. Mellin: AD was the transaction—it was offered for identification, then gone into, then I neglected to offer it in evidence. May that be received, your Honor?

The Court: All right.

(Defendant's Exhibit AD for Identification was thereupon received in evidence.)

Mr. Mellin: I would like to offer in evidence at this time Defendant's Interrogatories and the Plaintiff's Answers to the Defendant's Interrogatories.

The Court: All of them?

Mr. Mellin: Yes; there aren't too many.

Mr. Mellin: At this time, your Honor, I would like to offer the deposition of Mr. Armstrong, one of the officers of the plaintiff, in evidence as the next in order.

Mr. Gray: In that we have, if your Honor please, many questions asked based or predicated upon the thesis that Mr. [365] Armstrong is the inventor, and asking him what his concept was of the invention. Now, we discovered during the trial that that was an improper question insofar as this case was concerned. We object to each and every one of them on the same ground that your Honor sustained the objection when we asked that question, namely, of course, that it calls for the conclusion and opinion of the witness, and that it purports to usurp the function of the court. Insofar as those questions are concerned, I think they are objectionable under the ruling that your Honor has made. Insofar as the rest of it is concerned, I do not know of any objection.

Mr. Mellin: If your Honor please, there is a little difference. I didn't ask him to interpret the patent; I asked him what they invented at that time.

Mr. Gray: What was his inventive concept?

Mr. Mellin: What he invented, not with relation to the subject of the patent. That is the court's function. I was trying to show what he thought or believed he invented, at the time they made this invention, and what it was at that time, so that we could make the comparison with the patent.

Mr. Gray: You framed your question in the same manner we did here, however.

Mr. Mellin: Except I didn't ask him to interpret the patent.

The Court: Well—— [366]

Mr. Mellin: I think, if your Honor please, there is only going to be a small portion of the deposition that we would refer to. We don't have a jury, and I think the Court——

The Court: I think it is proper to ask a man what he thought he invented.

Mr. Gray: That is what it goes to, what was his inventive concept at that time.

The Court: To that extent and for whatever weight it may have, I will allow those questions.

Mr. Gray: In other words, your Honor can defer a ruling on any of those things when the subject is gone into or reliance is placed upon it.

The Court: Well, I don't want to defer too much. Whether there is any extensive briefing necessary in this case I don't know yet. I haven't heard all the evidence. Suppose I defer a ruling on that. No, I don't think that would be advisable. I will overrule the objection to those questions and let the answers stand for what they are worth. If they involve hearsay, if they are usurping the function of the Court, I won't consider them.

Mr. Gray: Thank you.

Mr. Mellin: That is exactly the way we would like it. So that may be offered as the next in order?

The Court: Very well.

The Clerk: Which deposition is that? [367]

Mr. Mellin: That is the deposition of John E. Armstrong.

The Clerk: It has been the practice not to give them an exhibit number, Mr. Mellin. Is that agreeable?

Mr. Mellin: It is all right with me. What do we do with the exhibits to it? Some of them are already in evidence; most of them—not most of them, but a lot of them are in evidence. I mean I am confused as to the procedure. I have the exhibits which were marked——

The Court: Do you want to offer some more exhibits?

Mr. Mellin: Those exhibits to the Armstrong deposition, the ones that are not already heretofore offered, of course. May I offer those exhibits not heretofore offered as one exhibit, your Honor?

The Court: Is there any objection to that procedure, or would you prefer to have them offered seriatim.

Mr. Bruce: Pardon me. I am expecting Mr. Gray to follow that.

The Court: Mr. Mellin wants to offer in evidence the exhibits to the Armstrong deposition that have not heretofore been offered in the trial in one group. I don't know whether you are satisfied with that, or whether you wish them offered seriatim.

Mr. Bruce: I think they should be offered, not as a group, but——

Mr. Mellin: May I offer Bulletin B, Jacuzzi Pumps, which [368] was offered as Exhibit B to the Armstrong deposition in evidence as the next in order?

(The document referred to was marked Defendant's Exhibit AJ-1.)

Mr. Mellin: The enlargement of Figure 1 of Jacuzzi patent No. 2,157,099 as AJ-2.

(The document referred to was marked Defendant's Exhibit AJ-2.) [368-a]

Mr. Mellin: Enlargement of the Piccardo patent—no, this is already in evidence as AJ-3.

The enlargement of the Piccardo patent 2,424,285 as AJ-4.

Mr. Bruce: This is what you just put in over here.

The Court: You have got that in, haven't you?

Mr. Bruce: You just put that in.

Mr. Mellin: No, I didn't—that is 285, and I should have read it 958. AJ-4 is 2,344,958.

(Whereupon, enlargement referred to, 2,344,958, was received in evidence and marked Defendant's Exhibit AJ-4.)

Mr. Mellin: Soft copy of United States Letters Patent 1,059,954, as AJ-5. This is the Hilliard patent.

(Whereupon, Hilliard patent, No, 1,059,954, was received in evidence and marked Defendant's Exhibit AJ-5.)

Mr. Mellin: And the enlargement of Exhibit C attached to defendant's interrogatories as AJ-6.

May that be stricken, Your Honor? That this is this one (indicating).

Mr. Bruce: Mr. Mellin, you stated to the Court at the beginning that you were relying upon nine patents. Now you are introducing others. Are you introducing these intending to rely upon them?

Mr. Mellin: No, they are just explanatory of the witness' testimony on one point, Your Honor. It is not in anticipation—it is pertinent to show that the witness—to explain the answers [369] of the witnesses with respect to centrifugal pumps having more than one discharge, that that was old in the art.

The Clerk: You have still got that one yet, Mr. Mellin?

Mr. Mellin: Just leave that out. I am not going to put these in. We can take the other deposition. And I want to put in the enlargement, the Italian patent drawing of 260,417, as the next in order. That is AJ-6, Mr. Clerk?

The Clerk: Yes.

The Court: Well, you have got that in already, haven't you?

Mr. Mellin: No, Your Honor.

The Clerk: He withdrew it, Your Honor.

Mr. Mellin: I withdrew the other AJ-6, Your Honor.

(Whereupon, Italian patent's enlargement, 260,417 was received in evidence and marked Defendant's Exhibit AJ-6.)

Mr. Mellin: That is all, Your Honor.

The Court: Wait a minute. Now, isn't that a duplication of N-2?

Mr. Mellin: No, it isn't, Your Honor. The witness gave a considerable explanation on this.

The Court: Oh, I see.

Mr. Mellin: It is in connection with his testimony.

The Court: I see.

Mr. Mellin: The defendant rests.

(Defendant rests.)

Mr. Bruce: Call Mr. Armstrong. [370]

JOHN E. ARMSTRONG

recalled in rebuttal on behalf of the plaintiff; previously sworn.

Direct Examination

By Mr. Bruce:

Q. Mr. Armstrong, in 1941 did your duties with the Jacuzzi Bros., Inc., include the supervision of the compiling of catalogues and advertising matter relative to your company's business? A. Yes.

Q. I show you Exhibit 20 for identification, and I ask you if that was a circular published by your company? A. Yes.

Q. When was it distributed?

Mr. Mellin: Just a moment, Your Honor. It seems to me that doesn't call for the best evidence. His verbal recollection—there should be records.

A. This publication was received the latter part

(Testimony of John E. Armstrong.)

of July and distributed immediately thereafter to all of our agents and accounts throughout the United States and foreign countries and was also distributed at the State Fair at Sacramento in the fall.

Q. How many of these circulars were printed and distributed, if you know? A. 10,000.

Q. Did you say that they were distributed at the State Fair at Sacramento? [371] A. Yes.

Q. That was in September of 1941?

A. Yes.

Q. I see.

Mr. Bruce: We offer in evidence Plaintiff's Exhibit 30 for identification as Exhibit 20.

The Court: All right; it may be received.

(Plaintiff's Exhibit 20 for identification was received in evidence.)

Q. (By Mr. Bruce): Now, I show you Exhibit 11 and ask you if that is a catalogue published by your company? A. Yes.

Q. When was this catalogue printed and published, if you know?

A. The catalogue was printed in the latter part of 1941.

Q. And when was it published?

A. You mean when it was——

Q. Distributed.

A. It was distributed in the latter part of 1941.

Q. Do you know how many catalogues, copies of the exhibit, were printed? A. 20,000.

(Testimony of John E. Armstrong.)

Q. And to what point were they sent?

A. They were sent to all of our accounts and all of our sales representatives throughout the United States and foreign countries, and to a great many of our competitors. [372]

Q. How many catalogs of the type of Exhibit 20 did you have printed?

A. The King Pump, the first printing was 10,000.

Q. And did you print most of those?

A. Yes, we only have a few——

Q. Will you identify the pages in the catalog, Exhibit 11, in which the pump system of the patents in suit are illustrated and described?

A. Thirty through 35, inclusive.

Q. Do the pump systems in the patent drawings, Exhibits 3 and 4, comprise a substantial part of your company's business? A. Yes, they do.

Q. When did you first put on the market the pump systems having the features of construction and the mode of operation of the pump systems illustrated in 3 and 4?

A. May I have that read back?

(Record read.)

A. March, 1940—I am sorry, 1941.

Q. March of 1941? A. Yes.

Q. Did Jacuzzi Bros., Inc., have a display at the State Fair at Sacramento in September of 1941?

A. Yes.

Q. Are pumps and pump systems embodying the

(Testimony of John E. Armstrong.)

operation, the mode of operation illustrated in those Exhibits 3 and 4—were [373] they displayed at such fair? A. Yes.

Mr. Mellin: Just a moment, to let my objection in. May I object to that, if your Honor please, as it seems to me that what was displayed would speak for itself as to whether they embody the patents. That is not for this witness to decide.

The Court: Well, where is the rebuttal here now? What are you meeting with this testimony?

Mr. Mellin: We have made no contention that they didn't disclose them, your Honor, at any time.

The Court: Where is the rebuttal in this?

Mr. Bruce: The point is, your Honor, that it lies in the fact that the defendant gained knowledge of the products of the plaintiff, and in 1941, and produced their line of pumps from the knowledge so gained in 1942.

Mr. Mellin: That is your argument.

The Court: Well, that is part of your affirmative case of infringement. What has there been, put on by the defendant, that calls for this rebuttal testimony? You can't just go ahead and keep on trying a case forever. The rebuttal should be limited to meeting the question of validity, as I see it.

Mr. Bruce: I will withdraw the question.

The Court: You put on your case as to infringement, and I haven't seen anything, any testimony that has been offered, [374] that has anything to do with the subject-matter that you are now covering, unless my memory fails me.

(Testimony of John E. Armstrong.)

Mr. Bruce: I will withdraw the last question.

The Court: Am I not correct about that? I don't recall any such testimony.

Mr. Mellin: We didn't contest, your Honor, when they put the catalogs out or when they exhibited at the fair.

The Court: There is no dispute about that.

Mr. Mellin: And besides, the question is improper because it compares the mythical structure they showed at the fair with the patents, which is not the proper way of disposing of it.

The Court: Isn't that argumentative?

Mr. Mellin: Surely.

Mr. Bruce: You see, your Honor, they contend, and there is testimony in here, that their structures exhibited in these illustrations are old, and what we want to show is that in 1941 or '42 they didn't consider that it was old.

Mr. Mellin: Oh, that is argument, your Honor.

The Court: Well, what are you adding to this case? The defendant's officer has already testified that he was in Sacramento and that he saw Mr. Jacuzzi's pumps displayed there. Now, do you want to have him say the same thing?

Mr. Bruce: Well, I am perfectly willing to withdraw the last question now. We can go into something else, which is [375] in dispute.

The Court: I think that it wouldn't be a rash assumption to say that both these concerns knew pretty well what the other one was selling. You

(Testimony of John E. Armstrong.)

don't have to have a blueprint of that, particularly.

Q. (By Mr. Bruce): Now, Mr. Armstrong, I hand you an impeller stage and ask you if you can identify the same (handing to witness).

A. I can.

Q. And what is the stage that you have in your hand?

A. It is the discharge stage from one of our pump series.

Q. One of the pumps, discharge stage as shown in Exhibit 3 or 4? A. Yes.

Mr. Mellin: Just a moment. Your Honor, I object to that on the ground that from the very face of it, it is not constructed as a discharge phase in the patent, unless the groundwork is laid that the discharge stage in the patent conforms to this, which it very obviously does not. Then I object to it as being improper.

The Court: Well, isn't that argumentative? What do you want to do with this thing you have got here? Do you want to offer it in evidence? Is that what you are leading up to?

Mr. Bruce: Yes, and I wish to offer it in evidence, your Honor. [376]

The Court: Well, you were asking the witness, though, to give his opinion as to whether that is a teaching of the patent?

Mr. Bruce: No, it is simply the construction of the stage, his impeller stage.

The Court: In a pump which they are producing?

(Testimony of John E. Armstrong.)

Mr. Bruce: In the pump which they are producing.

The Court: Well, what is the materiality of that, now, in rebuttal?

Mr. Bruce: Simply this, your Honor, that Mr. Carpenter testified under cross-examination on Friday that there was nothing in the exhibit 3 which would tend to lift the water to the highest stage of the pump if the low discharge 81 was open.

Mr. Mellin: If your Honor please, the patent specifically makes a drawing of what is used and specifically describes what is used on that point. Now, what they are doing is introducing an entirely different structure and trying to say that it is the patent structure. It is improper. The patent speaks for itself on that point. If Mr. Carpenter is wrong, the patent will show it; and if the patent doesn't show it, then there is no testimony that can be offered here on the point.

The Court: Well, that has always been my opinion on these patent cases. I think you have already had Mr. Armstrong testify as to what those patents show. I don't know how this is [377] going to add anything to that, particularly in rebuttal.

Mr. Bruce: All right, we will withdraw the offer.

The Court: You have already put on two or three days of testimony as to what these patents mean, and you have described them with diagrams and everything else. Now, what is this in rebuttal?

(Testimony of John E. Armstrong.)

Isn't the important thing you have to meet in rebuttal whether or not there is something new in this invention that has not been disclosed in these other things that your opponent has presented?

Mr. Bruce: That really is a matter of argument, too.

The Court: That is what I would get down to, because, Mr. Bruce, that is what you have to combat when you are up before an ignorant judge in these patent matters. This is not the Patent Office, and once you get into court, the judge doesn't have these myriad little pigeonholes that he can put things into, as in the Patent Office. He can only decide the case on some big principle that in equity appeals to him as constituting an invention. So you have to put up with us Federal Judges in these patent cases and try to convince us that there is something aside from all these multitudinous technicalities they go into in the Patent Office that convinces a judge in equity that there is something that calls for the extension of this monopoly to an individual. What has he done that raises the matter to that of sufficient dignity to say that he shall have a monopoly? That is a big problem [378] when you get into the court in these matters, and particularly so when you get before judges who don't know too much about these technical matters that are presented here. I think attorneys would be well advised if they didn't clutter up the courtroom with these tremendous number of exhibits

(Testimony of John E. Armstrong.)

and diagrams, and if they would just try to have a witness show the court that he has got something that is of sufficient, great importance as an improvement or as a novelty that the judge can say, "There is a man who is entitled to a monopoly for that thing." That is the way to get to a judge, if I may be so bold as to say so, in patent cases. And that is why I may be a little impatient at some of these matters that are presented. I think that in rebuttal, your problem is to have your witness take these exhibits that you have put in, that are patents, and point out wherein is the essential new thing.

Mr. Bruce: That is what we are trying to do, your Honor, in our case in chief.

The Court: I think that is your problem in rebuttal, as it is in every—not any more you than any other lawyer, in rebuttal—where prior art is involved.

Mr. Bruce: Well, your Honor has made a suggestion here which would be timely to follow.

The Court: I think so.

Mr. Bruce: And let us take——

The Court: That is your real issue, I think, the real [379] issue in rebuttal. I don't think that—is this the witness you have in mind to testify as to that, or do you have some other witness? I am not attempting to tell you how to put in your case, but I am just saying to you that I think that is the problem which interests me. I say this for your

(Testimony of John E. Armstrong.)

benefit, so that you may take advantage of it, because I think that attorneys shouldn't be required to work in the dark. I am in grave doubt as to anything that has got such a sufficient dignity in the general field here that is persuasive to the judge sitting in patent cases, and sitting as a judge in equity, that constitutes such novelty as distinguished from ordinary mechanical development and development of the artisan in this business of improving these pumps as justifies the granting of the monopoly of the patent. I have that doubt in my mind.

Now, I think that is the most important part of the case, and I would go into that if I were you, with such evidence as you have, and by argument. It may be you can reach it by argument drawn from the evidence already in; I don't know. I am not intending to say that, but I think that is your problem, more than anything else.

Mr. Bruce: Well, we will be glad to follow along that line I think before reverting back to those patents, I would like to take up something with respect to some of the testimony that has come in here by Dr. Folsom, and in connection with this so-called Veronesi patent. That is one that has cluttered [380] up the record quite a bit. And I think there has been so much thrown at your Honor in the matter of prior art that the real essence of the invention involved here has probably been lost sight of, the real issue.

(Testimony of John E. Armstrong.)

The Court: Well, I understand, and I notice that the pamphlet you have shown the witnesses, that the plaintiff company believes that the revolutionary thing that it did was this injector pump, that has this dual discharge. I may be wrong about it, but I see that that is the emphasis here, and I have heard some of the witnesses say here. Now, what is that? That is what I want to know. What is that? Where is the novelty in it? Where is the big thing that persuades the court of equity to say—because you are now in the court, you are not in the Patent Office—that that is big enough to warrant a monopoly for it? Or is it that big? Because that is the distinction in equity, when you are distinguishing, when you get into court; whether or not the thing that you are asking to be protected has arrived at that stature that distinguishes it from the ordinary improvement that a mechanic could make in a pressure system pump of this kind, a pumping system or pressure pumping system of this kind.

Mr. Bruce: One of the great difficulties in cases of this kind lies in the fact that after a matter has been discovered, that the problem solved always appears.

The Court: I know that; it seems simple. I have noticed [381] that. It is always simple after you tell somebody about an accomplishment.

Mr. Bruce: After you don't—

The Court: That's right.

(Testimony of John E. Armstrong.)

Mr. Bruce: As the Supreme Court said, anyone could discover America after 1492.

So the inventions in effect lie here in the discovery of something which after discovery and application, then anyone could come along and say, "Well, why didn't I think of that? It is simple. Anybody could have thought of it."

The Court: That is true, but the burden is now one of showing that that something after the event was at the time of sufficient dignity to warrant the granting of a patent, as distinguished from the improvements that would ordinarily be made by those who make their contributions in their construction of these pumps. Now, that line of demarcation is one that is sometimes difficult to make, and there aren't—the courts have announced all kinds of rules by which a judge is supposed to judge those things, but I have never found that the rules are of any help, because you can't fit these things into pigeonholes. You have to take each case as it comes up and the judge has to do the best he can with trying to do equity. And his best, in my opinion, is not too good in any of these cases. It is none too good. But whatever it is, he tries to do the best he can with what is presented to him, to see whether [382] or not, in his opinion, the particular thing that is now claimed reaches that stature of dignity that puts it into the new, as distinguished from the ordinary improvement. I will put it that way. Isn't that about it?

(Testimony of John E. Armstrong.)

Mr. Bruce: Yes. I will follow your Honor's——

The Court: I don't want to talk too much about this thing now, but I think that is the real nub of rebuttal in most of the patent cases, where it is claimed that there is novelty.

Mr. Bruce: Now, following that line, then, if your Honor please——

The Court: You said you had some other witness?

Mr. Bruce: I have a witness here.

The Court: Why don't you put the witness on whom you brought over especially?

Mr. Bruce: I brought him over especially. I will withdraw Mr. Armstrong, if I might, because this witness is a busy man.

The Court: All right, there is no objection to that?

Mr. Mellin: No, your Honor.

Mr. Bruce: Not that Mr. Armstrong isn't.

Mr. Bruce: We will call Mr. Granberg.

I might state for the benefit of the court that the testimony of this witness is connected with the interpretation, or connected with the Veronesi patent. [383]

The Court: Very well.

ALBERT J. GRANBERG

called as a witness on behalf of the plaintiff in rebuttal; sworn.

The Clerk: Will you state your name, please?

A. Albert J. Granberg, G-r-a-n-b-e-r-g.

Direct Examination

By Mr. Bruce:

Q. Mr. Granberg, your full name is Albert J. Granberg? A. Yes.

Q. And what is your age and residence, please?

A. I am 58 years old, live at 6001 Rockwell Street, Oakland.

Q. What is your occupation, Mr. Granberg?

A. I am president and general manager of the Granberg Corporation.

Q. How long have you been president and general manager? A. 12 years.

Q. What is the business of the Granberg Corporation?

A. Manufacturers of pumps and meters.

Q. Is the business of your company world wide, or purely local?

A. No, we have pumps in all the continents.

Q. Any particular type of pumps and meters that you manufacture?

A. Yes, we manufacture a positive discharge pump. We have started a self-priming centrifugal pump, and we manufacture a positive displacement meter. [384]

(Testimony of Albert J. Granberg.)

Q. In connection with your work as president and general manager, do you perform any engineering service?

A. Yes, I still do all the high points in the engineering and every now and then get in the drafting of it.

Q. Prior to the formation of your corporation twelve years ago, what was your experience relating to the manufacture and design of pumps?

A. Well, I was sales engineer and designer and so forth with the Brody Company. I was designer and production engineer with the Granberg Meter Corporation previous to that.

Q. I understand you have taken courses in mechanical and electrical engineering at the University of California Extension Division?

A. Yes, I took night courses for a period of about two years.

Q. What experience have you had in the making and rigging of shop drawings?

A. Well, I am the fellow that makes them, a lot of them.

Q. How long has this experience lasted?

A. Oh, since 1915.

Q. Have you made and patented any inventions?

A. Yes, I have between 40 and 50.

Q. In what fields do they lie?

A. Well, mostly in the mechanical field, such as meters and pumps.

(Testimony of Albert J. Granberg.)

Q. What experience have you had in the installation and operation [385] of pumps?

A. Well, I have been directly concerned with the operation of pumps ever since 1919, when we first started selling meters, because most meters, the liquid for the meters is propelled by pumps, and you often run into pump problems.

Q. Are some of those pumps of the centrifugal type. A. A majority are centrifugals.

Q. Have you any knowledge or general knowledge of pumps of the injector type?

A. Yes, I have general knowledge of it.

Q. Are you familiar with the drawings and specifications translated into English of the Italian patent of Veronesi, in 1927, Defendant's Exhibit N (handing to witness), and the translation?

A. Yes, I have seen this before. [386]

Q. (By Mr. Bruce): Now, calling your attention to the drawing N-2, Mr. Granberg, which is in evidence, the patent drawing, are you able as a practical engineer and one skilled in the art to determine from the drawing alone the flow path of the water through the pump unit?

A. I can determine only what is shown from the drawing.

Q. Referring to N-2, can you determine from that drawing alone? A. May I—

The Court: Oh, yes, go down.

A. I want to see if they are both the same drawing. With the exception of a passage from one

(Testimony of Albert J. Granberg.)

runner to the other, there is no outlet or discharge shown, also there is no discharge indicated on the drawing.

Q. Is there any indication on the drawing showing any part of the flow path?

A. Outside of a passage from No. 1 impeller to No. 2 there is none.

Q. Is there anything on the drawing which indicates how the water gets into the pump unit?

A. There is a dotted line here.

Q. It will be easier for you to refer to Exhibit N-2 in your testimony.

A. There is a dotted line showing a flange and I can only make an assumption that this opening in the center of the flange leads to the eye of the impeller, but that would be an outlet. [387]

Q. Is there anything on the drawing which indicates to you how the water gets from the input of the pump unit to the discharge?

A. None whatsoever.

Q. As a practical engineer and pump man of over 30 years' experience, are you able to conceive in your own mind how the pump structure of Exhibit N-2 can be made to function?

A. Would you ask me that question again?

Mr. Bruce: Would you read it?

(Question read.)

A. Why, yes, there is various ways of discharging the liquid from the pump.

(Testimony of Albert J. Granberg.)

Q. Will you elaborate on that, Mr. Granberg?

A. Well, discharge could be had and is often practiced, a discharge from each stage. Other pumps, again, the liquid will travel from one stage to the next and have a final common discharge, which is generally done in most pumps where there are multiple stage pumps.

Q. Now, did you make a study of the specifications? A. Yes.

Q. The English translation. I will show you the English translation. After reading the English translation or reference to the pump, are you able to determine the flow path of the fluid through the pump unit?

A. Together with the translation, the pictures become quite [388] clear and it speaks of one discharge; it also speaks of one pressure.

Q. What does that mean to you?

A. That would mean that there could not be a multiple discharge when it speaks of one; it couldn't be a multiple pressure when it speaks of one, and you couldn't have one pressure if you took multiple outlets for each stage.

Mr. Mellin: If your Honor please, I think what the witness is now doing is paraphrasing the specification in his own way, which is the Court's function, to determine those specifications, unless he limits himself to the precise specifications because the witness will undoubtedly have to admit the patent discloses this to be a discharge and this—

(Testimony of Albert J. Granberg.)

and now the witness says there is only one discharge. I think he should be limited to the translation. And if not, they are limited to his own translation, and a different translation is out of order.

Mr. Bruce: That is a matter of cross-examination for Mr. Mellin.

Mr. Mellin: It is, your Honor, but I think he is testifying to what is in the translation. That is usurping the function of the Court. The Court can read. We have had the drawing interpreted. I have no objection to his interpreting what he sees in the drawing, but when it comes to interpreting the specifications that is the Court's function.

Mr. Bruce: Your Honor, the patent is a publication, and the [389] publication must be read from its four corners. What Mr. Mellin is saying is that you can only consider the drawing; you have to disregard the specification in interpreting the patent.

Mr. Mellin: I am saying no such thing; I am suggesting that the Court can read the translation itself, and we don't need this witness' own paraphrasing of the translation; it speaks for itself.

Mr. Bruce: The witness is interpreting the drawing in the light of the translation. He says he can't make anything out of the drawing itself, so he refers to the translation to see if he can get any help. When he refers to the translation, something is disclosed in there which gives him an interpretation of that drawing. I want the witness

(Testimony of Albert J. Granberg.)

to show what that interpretation is, what this witness gets from the printed word in combination with the drawing.

The Court: All right; let him answer.

Q. (By Mr. Bruce): Now, Mr. Granberg, can you state, after reference to the specification in connection with the drawing, that you can state the flow path of the fluid through the pump unit?

A. The flow path to the pump units as described in this specification would indicate that a discharge—one discharge—is divided.

Q. And where is that discharge divided?

Mr. Mellin: In his opinion.

Mr. Gray: If the Court please, counsel is continually [390] interrupting.

Mr. Mellin: I don't want to, Your Honor——

Mr. Gray: If he has objection, I think he could formally make it, if Your Honor please.

Mr. Mellin: May I make it as an objection? If this is coming in as an opinion, let us have it as his opinion and not attempt to make it as a fact.

The Court: I take it it is an opinion.

Mr. Bruce: Of course it is an opinion. Mr. Mellin knows it.

The Court: We will have the question read.

(Question read.)

A. The discharge is divided after it has been discharged from the pump.

Q. (By Mr. Bruce): Now, what do you mean by that, Mr. Granberg?

(Testimony of Albert J. Granberg.)

A. Well, we make a pump with two discharges ourselves, or two—one discharge and two outlets, I should say; excuse me.

Q. Will you step down to the chart, please, and point out what you mean; follow the flow path as you interpret it from the drawing and specification, and refer to the numbers on the chart?

A. Liquid coming into the eye of this impeller plainly shows a discharge from this impeller through this pathway into that next impeller.

Q. Impeller 1?

A. Into impeller 2. And it shows a discharge from impeller 2 [391] into an orifice and the drawing does not show thereafter where that orifice leads to.

Q. If you will hesitate just a moment, Mr. Granberg; we seem to have run into some difficulty with the charts. Now, if you will proceed——

A. I can not interpret from this drawing whether there is a chamber in there, whether it has another impeller in here, or whether the thing is entirely solid. That I can not interpret. After the liquid passes into this section——

Q. “This section” is identified as 3?

A. That housing identified as 3—after that apparently is divided into two outlets, which is shown by these arrows as I see them here.

Q. One discharge going to what? Going into the jet?

A. The outlets and discharge may be two differ-

(Testimony of Albert J. Granberg.)

ent things in case of multiple outlets. I don't wish to be misunderstood. The discharge of the pump, as I have been trained, is the liquid discharge by the runners or rotors.

The Court: By the what?

A. By the runners, rotors or impellers. They are called by all those names at various times—commonly known. Now after the pump is discharged into a chamber, it could then be divided into a number of outlets.

Q. (By Mr. Bruce): And what outlets is the discharge divided into here? [392]

A. This shows two outlets.

Q. You are pointing to No. 5?

A. Yes, No. 5 and No. 4.

Q. And No. 4, or 9? 9 would be the outlet, wouldn't it?

A. Yes, that is an outlet. It has two numbers—4 and 9.

Q. 4 and 9. Now, the water which passes—under your interpretation, as I understand it, it enters at the inlet of the pump, which is shown behind here, you said—we will mark this, the dotted lines in there, we will mark that A—entering the pump casing at what point?

A. It would enter the pump casing at the point indicated by the dotted line of this flange?

Q. Yes. And from there where would it lead?

A. Lead to the eye of the impeller.

(Testimony of Albert J. Granberg.)

Q. The eye of the impeller is right at this point? A. That would be at this point, yes.

Q. We will mark that B. From the eye of the impeller will you follow the path?

A. Through centrifugal force it will be thrown outward to this opening.

Q. "By opening" what do you refer to?

A. Shown directly in front of the impeller.

Q. In front of the impeller. We will mark that opening C.

A. Then the liquid would lead through this orifice to the eye of the next impeller. [393]

Q. Through the orifice—we will mark that D—and the next impeller, which is numbered on the drawing No. 2. A. 2.

Q. All right.

A. The same action takes place in the second impeller as in the first, the water passing out through an orifice into another orifice or chamber.

Q. Is that chamber——

A. Thereafter the drawing does not disclose where the liquid goes.

Q. This is the chamber that you refer to?

A. Yes.

Q. We will mark that E. All right. Now will you follow the course further?

A. Well, the liquid doesn't—I mean the drawing doesn't indicate where the liquid goes from this orifice.

(Testimony of Albert J. Granberg.)

Q. How do you conceive that it goes after reading the specifications?

A. But the specification tells me that it is then divided in two, one for consumption and one for injection back down to the injector.

Q. I see. And in other words, your interpretation is that the discharge at 9, that would be a discharge to service? A. Divided discharge.

Q. Is divided, but it is divided after the water has passed [394] through all the impellers in the pump?

A. The drawing nor the specifications don't show or indicate any other division.

Q. Now, then, Mr. Granberg, referring to a three dimensional drawing, does that represent your interpretation of the patent that you get from the face of the patent and the specifications?

A. May I say it this way: This drawing complies to the description shown in the patent or illustrated in the patent.

Q. Now, for His Honor, will you point out the path of flow of the fluid through the pump starting with the suction pipe?

A. In that flange illustrated the liquid going into the eye of the No. 1 impeller, passing out through an orifice leading into the center of the second impeller; repeating itself again, passing out through an orifice again going into the eye of a No. 3 impeller, then passing out of No. 3 impeller through an orifice and into a chamber, where the liquid then divides into two outlets.

(Testimony of Albert J. Granberg.)

Q. One to the pressure pipe of the pump?

A. One discharge leading down into the injection——

Q. Injector assembly?

A. Injector assembly, and the other——

Q. To service?

A. As a patent described, leading out to the service.

Mr. Bruce: I will offer in evidence the three dimensional drawing illustrative of the witness' testimony as plaintiff's [395] next in number.

(The drawing referred to was marked Plaintiff's Exhibit No. 21 in evidence.)

Mr. Bruce: All right; you may take the witness.

Cross-Examination

By Mr. Mellin:

Q. Mr. Granberg, in the first place, during the years that you were with Ralph N. Brodie Company, Ralph N. Brodie Company made nothing in the order of what we know as the conventional centrifugal pumps, did they? So therefore that was a period of approximately, let us say from 1925 or 1926 up until you left the Ralph N. Brodie Company?

A. I was with the Ralph N. Brodie Company from '26 to '36, yes.

Q. And during that time the Ralph N. Brodie Company were not interested in and did not make

(Testimony of Albert J. Granberg.)

anything that was the equivalent of a centrifugal pump? A. No, they did not.

Q. And you spent all of your time as an employee of that company, didn't you?

A. I spent all of my time as an employee of the company.

Q. You were with them as late as 1942?

A. No, I left the Brodie Company in 1936.

Q. (By Mr. Mellin): Now, Mr. Granberg, so during that period you were not interested in any engineering problems on centrifugal pumps?

The Court: I asked that question because I was wondering whether this witness was connected with the company when I had the litigation with the Hydraulic Press Company in '42.

Mr. Mellin: Yes, I understand. [396]

Q. Referring to your own pump manufacture, you testified that the Granberg Company make a pump. That isn't a centrifugal pump as we understand centrifugal pumps, is it?

A. Yes, I do manufacture a centrifugal pump.

Q. When did you commence that manufacture? That is the one you said in your testimony you just started? A. Yes.

Q. But the other pumps that you make were made like the universal joint of an automobile, what we call a knuckle joint?

A. They are positive displacement pumps.

Q. They are not centrifugal pumps; in other

(Testimony of Albert J. Granberg.)

words, you can use those pumps either as a meter or a pump, isn't that so?

A. You can not use them as a meter or a pump.

Q. You use them as pump? A. Yes.

Q. They have offset shafts and not one that angles? A. May I explain?

Q. Go on and explain. Do you have any literature?

A. A positive displacement pump is a pump that delivers a given amount of revolutions.

The Court: Mr. Mellin, can't you get down to the issues of this case?

Mr. Mellin: Yes, Your Honor.

The Court: Everybody skirts all around it. Why don't you [397] get right down to it?

Q. (By Mr. Mellin): On Exhibit No. 21, Mr. Granberg, does it accurately show the discharge 9 as shown in the drawing of the Italian patent N-2?

A. The Italian patent doesn't show a discharge.

Q. You say that because what you see is a section—a piece of metal in section with a bolt going through it at the throat of 9?

A. That is a metal section, of course.

Q. With a bolt?

A. Not a discharge through it, no.

Q. You say that is what indicates there is no discharge through the bolt?

A. It shows no discharge below it.

Q. It shows an arrow extending from the inside of the first stage out, doesn't it?

(Testimony of Albert J. Granberg.)

A. May I look and see it? That doesn't indicate a discharge from this stage.

Q. I don't ask that. I asked you isn't there an arrow starting from within the chamber and extending through 9?

A. That isn't considered as a center line through the bolt.

Mr. Bruce: Just a moment, Mr. Mellin. Your question is misleading.

Mr. Mellin: He can protect himself.

Mr. Bruce: You are talking about a chamber and you are [398] pointing to a discharge.

Mr. Mellin: I beg your pardon; I asked if the arrow didn't start within the first stage chamber and extend out through 9. It is obvious, isn't it?

A. In the general practice of making drawings, that wouldn't be an indication of a discharge.

Q. I see. And also because of the fact that there is a solid section in the throat of 9 that tells you on the drawing that there is no discharge there?

A. To show a discharge you would have to have a dotted line in back of the heavy section.

Q. That was the ordinary drawing convention, Mr. Granberg, was it?

A. That would be a conventional way of showing the discharge—the outlet.

Q. I would like to call your attention, purely as a matter of drawing—you know what a foot valve is? A. Yes.

Q. You know that the water that comes up from

(Testimony of Albert J. Granberg.)

the foot valve has to get in, if it is to a pump, it has to get in in some sort of a pipe, isn't that correct? A. Yes.

Q. I call your attention to Exhibit 3, and I show you what appears to be a solid section below the number 15 between the foot valve and what appear to be the pipes for the entry? [399]

A. Yes.

Q. Is that a conventional way of indicating that structure?

A. You would assume this to be a pipe; it is shown the thread of a pipe and it is shown an opening, a hole, within the pipe. [399-A]

Q. All right. Now, I am calling your attention—11 is the foot valve, isn't it?

A. It is a foot valve, yes.

Q. Now, there *must* a fluid communication between the foot valve, 11, and one or two of these pipes up above it, isn't that so?

A. It shows fluid communication between the foot valve.

Q. It does? Now, I call your attention to a solid section between the foot valve and those pipes. Now, does that show any indication that fluid can pass from the foot valve into those pipes or not?

A. This drawing does not show any indication of the passage through that wall.

Q. Does not show it? A. No.

Q. And then as a matter of fact, there are no water—no water from the well could ever get into the pump if that was a fact, isn't it?

(Testimony of Albert J. Granberg.)

A. I did not say that, but I say it shows nothing.

Q. Now, wouldn't that teach you that that is a rib of the part that I am marking?

A. You may say the draftsman made a mistake. If that is a rib, he should have shown it dotted across there.

Q. That is the part I am marking 15-A. Now, would you say that to you as an engineer that would show you that there was a complete partition, a water-tight partition, between the foot [400] valve and the pipes?

A. Standard drafting, it shows a solid section.

Q. So there would be no communication between the foot valve, 11, and the pipes up above?

A. The drawing is wrong; it should be dotted lines if it is intended for a rib.

Q. I see, all right. Now the same thing would be true, wouldn't it, of Exhibit 4? And I call your attention to the foot valve of a structure in the lower right hand corner.

A. It is also shown as a solid section in the drawing.

Q. And your opinion as to the solid section through the outlet 9 is based on the same premises that you say that section 15-A and the Exhibit 3 is a solid section?

A. My opinion is based on the fact that it is not shown—it is actually shown as a solid section.

Q. In both instances?

(Testimony of Albert J. Granberg.)

A. In both instances; they are both shown as solid sections.

Q. Now, Mr. Granberg, the purpose of a water system such as this is to provide for you the water for use, isn't that correct? A. Yes.

Q. And the water for use is the water which you desire in a particular quantity or at a particular rate or at a particular pressure, isn't that so? That is the water for use; that is what determines what you want your pump to produce, isn't that so? [401]

A. Your question is not clear.

Q. I will reframe it. In other words, the prime object of a water pressure pump system is to provide to your house or to your garden water at a particular pressure or in a particular quantity rate per minute? I mean, that is what you buy a pump for, isn't it, to get water?

A. The pumps are used for many purposes, and the primary reason for a pump is to transfer water from wherever it be, up from a well, to farm use or house use or any other purpose; it is still a pump.

Q. That is correct. I am not disputing that. And you want the water that the pump gives you at some particular, in some particular quantity or at some particular pressure?

A. In cases pressure *are* required at a particular pressures.

Q. Yes. And so, then, when you want to buy a pump structure for your house, you will desire

(Testimony of Albert J. Granberg.)

that that pressure to your house be ordinarily of some particular pressure point, wouldn't you?

A. It depending on the designers.

Q. I don't mean that, but I mean ordinarily. Now, city pressure is 50 pounds, isn't it?

A. Yes, I would assume so in most cases.

Q. So that a household system, you would desire a pressure at at least above a minimum necessary to operate your appliances in the house?

A. I would say it would be desirable to have a pressure system [402] in a house.

Q. And you want it above some minimum pressure?

A. Well, what the general public would want I am not qualified to tell you.

Q. But it would have to be at some pressure, wouldn't it, to get it to your house in the ordinary instance?

A. To bring it to the house it would require pressure.

Q. Yes. So now, as a matter of fact, the translation tells you—it doesn't tell you that the water is divided at the third or last stage, does it? It tells you that first you bring the water to a desired pressure, doesn't it?

A. It speaks of the pressure.

Q. It speaks of bringing it up to a desired pressure, doesn't it?

A. It speaks of bringing the water to the pressure.

(Testimony of Albert J. Granberg.)

Q. Well, I will read you the translation:

“In the pump the pressure of the liquid is raised to the desired limit and the liquid itself then divided as mentioned hereinabove, into two parts; one of which is directed into the aforementioned line, 2, downwards while the upward goes upward into the aforementioned line 9.”

Now, isn't it just as feasible that the water is raised to the desired pressure wanted at the house, which is the first stage, part of it going through 9 and the rest being directed downward through 5 after passing through these stages to the jet? [403] Isn't that just as feasible an explanation of that operation as the one you have given?

A. That may be desirable. The specification, however, mentions dividing the pressure.

The Court: Dividing what?

The Witness: The pressure.

The Court: The pressure?

The Witness: Yes—assuming that it is only one pressure.

Q. (By Mr. Mellin): And again, Mr. Granberg, if you wanted to divide the water at this pressure that is coming out of 5, wouldn't the ordinary plumber or any engineer just put a tee on Exhibit 5 and take part of it off and run the other part down to the jet? Why would he have to reconstruct his pump to do it?

Mr. Bruce: Oh, well, that calls for——

A. Convenience.

(Testimony of Albert J. Granberg.)

Mr. Bruce: That is argumentative, Your Honor.

A. Convenience. We have two discharges on our pumps for convenience to the installation.

Q. But you don't have more than one stage in your pump? A. That's right.

Q. You just have the one?

A. We have two outlets, though.

Q. But you would offer only one pressure, and it is not a centrifugal pump? A. No. [404]

Q. Now, the meters that you were talking about, they are all piston type, aren't they, the meters that you worked with outside of some grease meters that rotated—they were positive displacement, too, weren't they? A. Yes.

Q. And the other meters you worked with used pistons? A. Yes.

Q. Now, these 40 or 50 patents that you have, they relate primarily to meters from a construction and an operational viewpoint; they are nothing like the structure shown in this Italian patent, isn't that so?

A. Not all together. As I said before, in meters you come in contact with a lot of pumping problems and in designing a meter service station pump unit, it was necessary to include pumps. In designing bulk plant distributing unit, you must have pumps. In designing truck installation of meters, you must have pumps.

Q. Now, Mr. Granberg, referring to the section

(Testimony of Albert J. Granberg.)

that you mention was a solid section, which I am going to indicate by an arrow on No. 2, and by the letter A-1, you will agree with me that that is a round boss, wouldn't you? Do you know what I mean by a round boss?

A. You mean a boss——

Q. A-1, for the bolts to pass through.

Q. A boss for the bolt to pass through—it is not so indicated.

Q. But it is not so indicated. But I notice that you—— [405]

A. It could be.

Q. I see. You have drawn it on your drawing that way?

A. If you want to use your imagination, of course that could be a lot of things could be made out of a drawing.

Q. All right. Now, assuming that the section A-1, the top of which is at the outside diameter of the casing, assuming that is a solid partition across 9, you can't get any fluid, it is humanly impossible to bring fluid from any point there, isn't that so?

A. I did not specify how or state how the fluid was brought to this outlet. But the drawing does not show how; that I did specify.

Q. All right. I understand that. Now I am going to mark a point here A-2, which is a solid section across the inner throat of 9, is that correct?

A. Yes.

Q. Now, if that is a solid section completely across the throat of 9, then it is humanly impos-

(Testimony of Albert J. Granberg.)

sible to get water to 9 from any point in the pump, even the way you have described it on your illustration, isn't that a fact?

A. There appears by looking at this view to be considerable space between the bolt bosses. Whether the liquid is intended to pass full length through, which it apparently must do in this case by looking at the outside of the drawings.

Q. Now, you still haven't answered my question. A-2, you said, [406] was a solid section which would be a partition across the inner side of 9. Do I understand your testimony correctly?

A. It shows a solid section.

Q. Would that be a complete partition across the throat of 9? A. That is not shown.

Q. So you don't know whether it is, or not?

A. I do not.

Q. But you assume in your illustration that it is not?

A. I do not assume the illustration. I state the picture does not show it.

Q. All right, in your illustration you assume it is a round boss, is that correct (indicating)?

A. This illustration shows it to be a round boss.

Q. And that is what you assume is the construction of—

A. Many other drawings mention—many other ways and means could be used to bring water to that outlet.

Q. Now, I want to get an answer to this one

(Testimony of Albert J. Granberg.)

question, Mr. Granberg, and I will save you a lot of time. If what I have marked A-2 is a complete partition across the throat of 9 (No. 15-a), as you have testified is the case in 15-A in Exhibit 3 is a complete partition across them, then you can't get water from any point, the interior of the pump, to pass out through 9, isn't that a fact?

A. I will restate it. That drawing shows a solid partition and does not show where the orifice may go. [407]

Mr. Mellin: May I have that answer stricken, Your Honor, as not responsive?

Q. I am asking you if it is a solid partition across there, is it humanly possible to get any water out of 9 at all?

Mr. Gray: The Court should take judicial notice that if there is a solid partition you couldn't put water through it, without asking the witness—if that is all the question is directed to.

The Court: Well, of course I can't tell whether there is some other way. I think counsel is entitled to an answer to the question.

The Witness: Would you state the question—am I to interpret the drawing, or is this an assumption?

Q. (By Mr. Mellin): All right, you said that the part I have marked A-2 on N-2 is a solid——

A. It shows a solid partition, all right.

Q. And it doesn't have any dotted lines, so there isn't any passageway through it?

A. It does not show any dotted line.

(Testimony of Albert J. Granberg.)

Q. So there is no passageway through it on either side? A. It shows no passageway.

Q. All right. Now, therefore, if that is the case, A-2 must be a solid partition across the inner end of the discharge outlet 9, isn't that so?

A. From the drawing it shows no orifice to the discharge. [408]

Q. Will you answer my question that way; so that would be a solid partition across the inlet of 9 in that circumstance?

A. It does not, the drawing does not indicate it is a solid partition across, necessarily.

Mr. Gray: We are going to assume——

Mr. Mellin: I can't get an answer here. That is why I put it in that form.

A. Well, the question you ask is impossible to answer.

The Court: Why is that?

The Witness: Well, he is asking that if it was a solid wall across the outlet would it be an opening in it. Well, of course not. If it was a solid wall.

The Court: Well, I thought you said that the drawing showed it to be solid.

The Witness: The drawing shows it as solid.

The Court: So that according to the drawing, and in your opinion, there is no way of getting the water out of there, isn't that right?

The Witness: The drawing does not show it.

The Court: That isn't what I asked. Would you read this?

(Testimony of Albert J. Granberg.)

(Record read.)

The Witness: According to the drawing, I see no way of getting out through the outlet.

The Court: All right. Now you can ask him.

Q. (By Mr. Mellin): But yet the patent teaches you, does it, [409] Mr. Granberg, that they expect a discharge through 9 of water? A. Yes.

The Court: Then you could say, after having read the specifications and the rest of it, that while it appears that way on the drawing, that nevertheless there is, looking at the whole picture, there is a way provided for?

The Witness: The specification definitely shows that—they specify that, yes.

Mr. Mellin: Would you read that last answer? I didn't hear it.

(Record read.)

The Court: In that respect, then, it is not unlike the drawing in Exhibit 3 that he showed you down there?

The Witness: Which is Exhibit 3?

Mr. Mellin: Beg your pardon, Your Honor?

The Court: No, the one behind that. In that respect it is not unlike the drawing in Exhibit 3, the foot valve?

The Witness: Yes.

The Court: Because there you have the solid surface there, too, but apparently there is a means of bringing the water through?

(Testimony of Albert J. Granberg.)

The Witness: It is an assumption; I assume—the picture shows it solid, though.

Q. (By Mr. Mellin): Now just a couple of questions more, Mr. Granberg. Now,— [410]

The Court: Well, I am afraid—

Mr. Mellin: I am going to quit, Your Honor.

The Court: Well, I am going to—I don't want to shut you off. We just can't finish the case today.

Mr. Gray: If we could finish Mr. Granberg, it would be appreciated.

The Court: Well, I have got to leave in a few minutes, and I don't want to shut you off from your rebuttal. I mean from any further questions you want to ask.

Mr. Mellin: If there are any further questions they want to ask, Your Honor, I would rather it be deferred until tomorrow morning.

Mr. Bruce: I don't see any further ones up to the present time.

Q. (By Mr. Mellin): All right, then, Mr. Granberg, the various lines with arrows on them, broken lines, with dots throughout the pipes from the discharge 5 down through the pipe 2 and through the jet 1 and up through the pipe 7—those arrows are indicative of the direction of the flow of the fluid through the pump, isn't that true? A. Yes.

Mr. Mellin: That is all.

The Court: What do you mean by "a dual discharge pump"?

(Testimony of Albert J. Granberg.)

A. A pump having a discharge and dual outlets.

Q. All right. Is this one, the Italian patent? Does it show [411] that?

A. According to the description, it is a dual outlet pump and a single discharge.

Q. Well, now, I don't quite understand that. What is the difference between a dual outlet and one discharge?

A. Well, if you have discharges from more than one stage, you would have two pressures, because each stage will bring up so much pressure.

Q. I see what you mean.

A. Then you could not speak of the pressure, you would have pressures—You are speaking of two of them. Now, the discharge of a pump, or from a pump, is considered the liquid that is being put out by a pump, whether it goes to one stage or ten. Then after it leaves the pumping unit, it may be divided into two, three or more.

Q. I understand what you are saying.

A. That is what we do in our pump; we divide it after it leaves the pump. [412]

Q. (By Mr. Mellin): Because you only have one stage? A. Well, we only have one stage.

Q. All right, Mr. Granberg, just one question. You have seen multi-stage centrifugal pumps before? A. Yes.

Q. In which they have a discharge from separate stages? A. Yes, I have.

Q. In which case they would get discharges at separate pressures? A. Yes.

(Testimony of Albert J. Granberg.)

Q. And that was old at least 15 to 20 years to your knowledge? A. I would say so, yes.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Bruce:

Q. Have you seen that dual discharge at different pressures in the pumps employing the injector?

A. No, I have not.

Mr. Bruce: That is all.

Mr. Mellin: No further questions, your Honor.

The Court: All right, are both sides satisfied to let this witness go?

Mr. Bruce: Yes, your Honor.

Mr. Mellin: Yes, your Honor.

The Court: All right, thank you. [413]

(Whereupon, following a general discussion among Court and counsel relative to the progress of the case, an adjournment was taken until 9:30 o'clock, a.m., tomorrow morning, Tuesday, May 17, 1948.) [413-a]

Tuesday, May 17, 1949, 9:30 o'Clock A.M.

The Clerk: Jacuzzi Bros. vs. Berkeley Pump Company.

Mr. Bruce: Ready. [414]

* * *

Mr. Bruce: Mr. Armstrong.

JOHN E. ARMSTRONG

recalled as a witness on behalf of plaintiff in rebuttal, and having been previously duly sworn, testified as follows:

Direct Examination
(Continued)

By Mr. Bruce:

Q. Mr. Armstrong, in your experience as an engineer being in the pump business, are you familiar with the type of pumps that were generally used in the industry and the problems they presented prior to the making of the inventions here involved? A. I am.

Q. From your experience, there is nothing new about a multi-stage pump, is there? A. No.

Q. Nor using a pressure tank? A. No.

Q. Nor pressure switch? A. No.

Q. Nor using an injector? A. No.

Q. As far as the centrifugal pump system is concerned, and without an injector, there is nothing novel about taking [415] off two service discharges, is there? A. No.

Q. Prior to the inventions in suit how were the low-pressure discharges taken from an injector pump system?

A. The low-pressure discharge was commonly taken from the suction line, or that is one method generally used for specific installations, because it had two disadvantages: First, when we take a low-

(Testimony of John E. Armstrong.)

pressure discharge from the suction line, it does not deliver as much water, which for irrigation that is what you want, the quantity of water—it does not deliver as much water as would regularly come from a normal pump discharging from the highest stage. It also presents the difficulty that in many instances the taking of a discharge from the suction line would result in loss of prime.

Then, for an irrigation discharge or a low-pressure discharge in a conventional unit it was also possible to take off from the pressure tank and restrict that opening with a valve. If you did not restrict it with the valve you would reduce the pressure in your tank. If you restricted it with a valve, then you restricted it and got less water. Of course, low-pressure discharge, the pressure in the system can also be changed by varying the adjustment or setting the pressure switch.

Q. Mr. Armstrong, will you tell us what is new or unique in the water system of Exhibit 3? [416]

A. Your Honor, I made some notes this morning about five o'clock on this subject. I wonder if I might read them.

The Court: It doesn't make any difference to me if counsel has no objection.

Mr. Mellin: I suggest if he has notes and is going to read them, that he offer the notes in evidence and save us the time.

Mr. Gray: If the Court please, he is using it to refresh his memory.

(Testimony of John E. Armstrong.)

Mr. Bruce: That is the purpose.

The Witness: Patent 285 has three important features: First, it provides a discharge from the system at a pressure lower than that used to drive the injector. That has never been done before in a conventional system, and results in increased capacity. It was contrary at the time, it was contrary to the regular teachings of the conventional practice in the industry, which was to take off either from the tank or from a discharge in the suction, which has the disadvantages that I mentioned before.

Mr. Mellin: Your Honor, may I interpose an objection to this? This is going over Mr. Candido's testimony again. He went over all the advantages of the patent in exactly the same way. It seems to me it is cumulative and not proper rebuttal. There is no testimony as to what that system showed in the defendant's testimony. This is just repetition of Mr. [417] Candido's testimony and also Mr. Armstrong's testimony.

The Court: Of course, counsel, the plaintiff is entitled to show what the differences are now between the former systems as taught by the other patents and this.

Mr. Mellin: Yes, if you make comparison with the other patents.

The Court: He can't do it at one instant of time. I will overrule the objection.

The Witness: The second important feature of this invention is that it provides a more efficient

(Testimony of John E. Armstrong.)

low-pressure discharge, which for irrigation or low-pressure use results in increased capacities than anything heretofore obtainable. In some instances, your Honor——

The Court: I thought that you said that this is more of a high-pressure take-off.

The Witness: This is a high-pressure take-off. This one, your Honor, may be for low-pressure. It is sometimes placed on the bottom stage. In some cases they require a little higher pressure; in other words, to get water over a hill or overcome some friction in the pipe-line, to raise it up to this stage; and in some cases even higher, depending on the requirements of the consumer. But as illustrated in this type of system, it is a low-pressure discharge because it discharges at a pressure less than this.

Q. (By Mr. Bruce): When you say “this” you are referring to [418] the high-pressure discharge?

A. Yes, 57. We also sell this unit without the pressure tank on it. In other words, you have got, as it is shown on the drawing, a pressure system which accomplishes two things: It gives you a low-pressure discharge and a high-pressure discharge. Prior to this time the Rachel Jacuzzi patent taught that a low-pressure discharge could be taken from the suction line; in other words, we have increased the capacity from a given unit without the disadvantages that we have mentioned.

Third, the invention provides a pump unit which discharges at two pressures with one control sys-

(Testimony of John E. Armstrong.)

tem, one pressure switch. It takes the place of two systems. Formerly, a high-capacity pump was used for irrigation and for pressure system use the farmer bought another pump which was used in the pressure system, which has presented the disadvantage that in many instances the well is of such limited diameter that he could not get both sets of pipe in the well, necessitating the drilling of another well. In this system we take off a low-pressure discharge, serving the purpose of low-pressure irrigation pumps, and also at the same time take off a high-pressure discharge for his household requirements, making it a completely automatic system, regardless of which discharge is being used. It assures the housewife always has adequate water in the pressure system, and it is completely automatic and self-contained. It gives them a pump which we catalog now in [419] capacities delivered at or in excess of 200 gallons per minute for irrigation purposes from the low-pressure discharge, and we have on occasions built pumps with either greater capacity.

Q. Will you tell us what is new or unique in the water system of Exhibit 4, and you might bring that exhibit over onto the easel, Mr. Armstrong.

A. Patent No. 958, your Honor, embodies all of the points previously mentioned in 285, plus the additional advantage of being able to take off the water—In other words, this is a completely self-balancing pump and does not require a control valve

(Testimony of John E. Armstrong.)

in either of two discharges which we have. Some times we use it with one discharge, sometimes we use it with the other; sometimes we use it with both of them. But the fact that it is self-balancing, and it is made possible by all of the water from the stage of highest pressure being directed to the injector—Now, in some instances we have made these pumps with as many as 19 stages driving the injector for pumping depths from five to six hundred feet of water, with this construction and elimination of mechanical devices—in other words, the self-balancing feature for which this pump is designed has resulted in the elimination of countless man hours and miles of travel by ourselves, by our dealers, and our distributors to serve or adjust or readjust the control valve as the water level changed in the well, which so often happens. This pump, your Honor, is installed, primed by filling it completely [420] with water and the electric current is attached to it and that is all. It starts pumping and stays pumping. This pump and the feature of driving the jet with all the water from here has another important advantage.

Q. From “here” you mean the point of highest pressure?

A. Yes, to the point of highest pressure—has another extremely important advantage, which becomes apparent in extra deep settings, say three, four, five, or six hundred feet. Ordinarily, the motor operating a pump comes up to speed within a matter of, well, it is almost instantaneous—a fifth of a

(Testimony of John E. Armstrong.)

second or a second. But when you have three or four hundred feet of pipes down in the well, it takes a length of time for pressure to push on that to hold the momentum of the water in the pipes and to get that moving. Now, in the conventional system it discharges from the stage of highest pressure, the pressure in the tank drops, the pressure switch starts, starts the motor, and the pump starts rotating in about, we will say, half a second. Then it starts to pump water. The minute these impellers start rotating, they start pumping water, and they start discharging water from the point of highest pressure and out into the system. In the meantime the pressure that it developed by the control valve setting, which we have on a conventional system, is pushing on this big long column of water, trying to get it moving. But it is like pushing an automobile. It does not move right away, and it takes a [421] little time to get going. Consequently we have the pump pumping and no water being delivered by the injector to the pump. That results in the centrifugal pump of a conventional system discharging the water into the tank and none coming in to replace it. That results in loss of prime, your Honor, and stalling of the pump. In other words, as water comes in here and it is discharged—I wish I had a conventional system here—well, never mind, I can get by without it.

First, in a conventional system it is discharged from the point of highest pressure, and then pumping water out of the discharge, no water is coming

(Testimony of John E. Armstrong.)

in from the injector, and it causes the pump to pull in air or pull water—yes, this illustrates what I am talking about.

Q. Exhibit AJ-2.

A. All water from the impellers is pumped out through this control valve, and no water comes in from the injector to replace it. Consequently we have an empty space in here which is filled with water vapor, causing the pump to lose its prime and to cease pumping or to stall. When that happens you have to come out, remove a gauge or something, close the system off, reprime it, and start it again. In a conventional system, to overcome that on an extremely deep lift, you can overcome it by closing the control valve more. So that it restricts it. A little water may be discharged, but not enough to cause [422] stalling. And then as the pressure starts moving this long column of water in two or three seconds, after pushing two or three seconds this water starts coming from the injector and the pump is in operation. But then because we have closed the control valve, it does not discharge as much water. Now, in actual installations, and we have many of them, actually the consumer or someone had to go out, close this valve completely off, start the pump, and then open that valve and adjust it every time the pump was placed in operation. Now, it is impossible for that to occur in this type of system because the impeller which drives the jet, if it does not get any water from the well at all—

(Testimony of John E. Armstrong.)

Q. In referring to this time, you are referring to Exhibit 4, patent 958?

A. Yes—if it does not obtain, if this impeller does not obtain the water from the well because of the momentum from the pipes, it draws the additional water, which runs back through this line and into the impeller, and that additional quart or gallon of water is enough to drive the jet and place the pump in operation.

The Court: In that respect is it any different from the teaching of Exhibit 3?

A. The other one?

Q. The other patent.

A. Well, not when Exhibit 3 is discharging from only one discharge, [423] which could be located over here and discharging to a pressure tank.

Q. Exhibit 3 cannot be operated without a mechanical device?

A. From this discharge, yes, your Honor. This discharge does not require a mechanical device.

Q. You said that the main difference in the teaching of Exhibit 4 was that it eliminated the mechanical device; it saves on the time of adjustment, the people going out there to look at it?

A. That is right.

Q. But the description which you just gave a moment ago is equally applicable to Exhibit 3, is it not?

A. Not in that respect, when this discharge is on

(Testimony of John E. Armstrong.)

there.

Q. (By Mr. Bruce): This discharge being the high-pressure discharge?

A. The high-pressure discharge to the pressure system. Now, if that is removed and not used, then practically what we would be doing, your Honor, would be making Exhibit 3 into Exhibit 4, if we eliminated this control valve. Now, this control valve, here, in the automatic system, taking the place of two pumps, two complete pumping systems, an irrigation pump and a high-pressure pump, this valve plays a very important part in maintaining——

Q. Designate the valve.

A. This valve 83 in the low-pressure discharge plays a very important part in maintaining a proper balance of the system. [424] For example, we will say that the low-pressure discharge 81 is opened, placing the system in operation. Then due to the water level or the change in water level, the system reaches an equilibrium in the pressure tank, which maintains possibly only 20 pounds in the tank, and you want to maintain a minimum of 30 pounds in the tank. That is accomplished by adjusting this valve.

Q. Adjusting the valve?

A. The control valve in the low-pressure discharge, yes, the valve 83. It is not a control valve in the strict sense that it is required to maintain the system in operation. It is a trimming or a balancing valve. But this pump will operate without the necessity of the valve 83.

Q. Are you familiar with the structures and

(Testimony of John E. Armstrong.)

modes of operation of Defendant's Exhibits here in evidence, M through V? You have copies of those exhibits in your hand and the Hilliard patent 994, referred to in your deposition, and also here in evidence? A. Yes.

Q. You are familiar with the structures there?

A. Yes.

Q. Do any of the devices described in any of these patents embody any of the features that you have told us are unique in Exhibits 3 and 4?

A. No. [425]

Q. Does a pump system in which you take off a low-pressure discharge from the suction line embody the same mode of operation as the one in which you take off a low-pressure discharge from an impeller stage? A. Definitely not.

Q. Calling your attention to the drawing only in Exhibit N—you can refer to Exhibit N, that being the Veronesi patent 1927, and you can refer to Exhibit N-2, which is an enlargement—are you able from the face of the drawing as an engineer to determine the flow path of the fluid within the pump? A. No.

Q. Is there any indication on the drawing showing any part of the flow path? A. Yes.

Q. Would you point that out, please?

A. There is an indication that there is a discharge at this point directing the water downward in the pressure pipe to the injector. There is also an indication of flow in the injector upward at this point.

Q. Mr. Armstrong, may I interrupt? When you

(Testimony of John E. Armstrong.)

say "this point" it does not mean anything in the record. Will you start your answer again so it might be clear? You can refer to numerals on the drawing if you wish. Is there any indication on the drawing showing any part of the flow path? [426]

A. There is an indication of flow path down the pressure pipe 2, an indication of the flow path through suction line 3, and through the suction line 7 upward. There is also a discharge pointing outward from the pump X at the point 9.

Q. Is there anything on the drawing Exhibit N-2 which indicates to you how the water gets to discharge 9? A. No.

Q. With the aid of the specifications translated into English, can you determine the flow path of the fluid within the pump? A. Yes.

Q. Directing your attention to Defendant's Exhibit Z, does that illustration accurately show the flow path of the fluid in accordance with the drawings and specifications of the Veronesi patent?

A. No.

Q. Directing your attention to Plaintiff's Exhibit 21, does that accurately show the flow path of the fluid within the pump? A. Yes.

Q. Without asking you to trace the flow path, does Plaintiff's Exhibit 21 indicate by arrows the flow path as taught by the drawing in the specifications of the Veronesi patent? A. Yes.

Q. You are familiar with the bulletins introduced here yesterday, Nos. AG and AH, are you, Mr. Armstrong?

(Testimony of John E. Armstrong.)

A. Well, I would like to see them again. I can't remember. [427]

Q. Maybe we had better have the original exhibits (handing documents to the witness). You have read the translation of the bulletin, haven't you? A. Yes.

Q. One of them? I will ask you, then, after you have checked them, do the bulletins Exhibits AG and AH, illustrating, pertaining to the Veronesi pump, show the flow path of fluid within the pumps there illustrated or described?

A. No, they do not. [427-a]

Q. Then, from your testimony, I take it, that neither the Veronesi patent, the specifications or the patents, indicate anything but a conventional multi-stage jet pump as illustrated in the Frank Jacuzzi patent you mentioned here, referred to a while ago, is that correct?

A. May I have that question again?

(Question read.)

A. That is correct.

Q. (By Mr. Bruce): Exhibit AJ-2. Now, I take it that as an engineer, it is not your contention or you do not contend that with reference to the illustration of the Veronesi patent, while that portion of the casing through which the bolt excess passes, seals the entire opening of the discharge 9.

Mr. Mellin: Just a moment. I object to that as

(Testimony of John E. Armstrong.)

impeaching their own witness Granberg. He said it did.

Mr. Bruce: He certainly did not.

Mr. Mellin: The record speaks for itself.

The Witness: May I have the question again?

The Court: I will allow it.

(Question read.)

A. No, there must be a way to get the water to that.

Q. (By Mr. Bruce): But from the face of the drawing N-2, it is not shown now that is done?

A. That is correct.

Q. As an engineer, are there various means, various pump [428] structures in which a discharge is taken which is not located over any particular stage?

A. Yes, that is correct. As an illustration of that, I have a bulletin of the Berkeley Pump Company, which takes the discharge out from a point which is not aligned with any stage. Although it is in the middle of the casing, it is still the point of discharge of highest pressure.

The Court: I am going to allow you to have the rest of the morning in this case, so we can finish it.

Mr. Bruce: We are almost through.

Mr. Mellin: I want to cross-examine, Your Honor.

The Court: It would be better if I bring this jury back so you won't rush.

(Testimony of John E. Armstrong.)

(Thereupon, the Court took up another matter with counsel, after which testimony in the instant case was resumed, as follows:)

Mr. Bruce: We would offer in evidence as illustrative of the witness' testimony the Berekley catalogue to which he has just referred, as our exhibit next in number.

(The catalogue referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 22.)

Q. (By Mr. Bruce): Mr. Armstrong, I do not know whether I have asked you this, but without tracing the flow path on that drawing, Exhibit 11,—

Mr. Mellin: 21.

Q. (By Mr. Bruce): —21, do the arrows indicate the flow path [429] as taught by the drawings and specifications of the Veronesi patent?

A. Yes, it does.

Mr. Mellin: I object to that as being asked and answered.

The Court: He said that one did, the other one did not.

Mr. Bruce: I was not sure whether I had asked that question.

Q. Referring to Exhibit 3, if you remove the control valve 59, can you rely on the back pressure from the pressure tank to perform the function of a control valve?

(Testimony of John E. Armstrong.)

A. No. The reason for that is that while the pressure switch setting might be maintained at a high point so that it normally would be sufficient to maintain enough back pressure to operate the jet, you can't depend on that because on the discharge of the tank there are generally many outlets, several in the house, kitchen faucets, in the bathrooms, some in the yard, and assuming somebody is taking a shower, somebody is washing a car, and somebody is doing the laundry, it is possible to draw more water from the pressure tank than the pump will deliver, in which case the pressure keeps going down and down, because the pump is not keeping up with the requirements, until such a point that the pressure in the tank has been reduced to a point below that necessary to operate the injector, and we have loss of prime or stalling of the system.

Mr. Bruce: Your witness, Mr. Mellin. [430]

Cross-Examination

By Mr. Mellin:

Q. Mr. Armstrong, did you make this drawing, 21? A. No.

Q. Made under your supervision? A. Yes.

Q. As a matter of fact, isn't it true, Mr. Armstrong, that you have entirely changed the internal construction of the pump in order to make it operate in the fashion that you say is so in Exhibit 21?

A. It was made in accordance with the teachings of the specifications.

(Testimony of John E. Armstrong.)

Q. In other words, it illustrates, however, a construction entirely different from the actual construction illustrated in N-2 as far as the section part is concerned, isn't that so? A. No.

Q. Isn't it a fact, Mr. Armstrong, you have had to add in N-2 an internal wall separator from the bottom of the boss shown in Exhibit N-2?

A. No.

Q. I show you the exhibit.

A. Well, it may appear on there. It would not be necessary. I believe this wall would tend to contact that boss.

Q. If it contacts it, wouldn't it form a seal to keep the water from going over it? [431]

A. No, not from this annular chamber here. The water comes down around this bolt on both sides in an annular passage.

Q. That is not the way the drawing shows it. Don't you see an arrow going underneath the boss?

A. That arrow is on the back of the boss.

Q. What do I see in front of the boss?

A. I told you it passed on both sides. It passes in front of the boss, down one chamber, from this annular chamber and back of the boss on the other side and up and around and over this boss and out the discharge.

Q. Anywhere in Exhibit N, do you find any such flat wall such as I am indicating on Exhibit 21 as A?

A. That is a section, yes. It is represented over here on this other drawing.

(Testimony of John E. Armstrong.)

Q. Let us get this section correct. I will label another section B. Isn't the section I am pointing to here—and I am marking it little b, isn't that the section B in this drawing?

A. What was the question, please?

Q. Isn't the section b in both drawings the same section?

Mr. Gray: Mr. Mellin, may I make this suggestion to you, if you will pardon me. You want to be careful because you are using a b here and you already have a B.

Mr. Mellin: Little b in both drawings.

Q. Isn't that the same section, Mr. Armstrong?

A. I believe it could be. [432]

Q. In fact, the drawings show them to be the same, N-2 and 21? A. Yes.

Q. Below the section b in 21, we have another annular wall, which I have labeled a, isn't that so, and you will notice that there are separate parts on the drawing?

A. I do not think that it is necessary——

Q. I am not asking whether it is necessary; is it shown on the drawing or not? That is all I am asking.

A. It is shown on the drawing.

Q. In Exhibit 21, and you do not find that section in N-2, do you, that separate inner wall that you have on 21?

A. The point that I was trying to make was that this does not necessarily indicate that there are two separate pieces.

(Testimony of John E. Armstrong.)

Q. It illustrates it that way; to you as a draftsman it illustrates it in that fashion, doesn't it?

A. Now that you call my attention to it, it is possible it is caused by not proper shade lines by the draftsman.

Q. So there isn't any such wall, a, as shown in Exhibit 21 in N-2, is there?

A. Well, a and b could be the same wall in this case here.

Q. But they are not shown as the same wall in 21, are they? You said they contacted the boss in the bottom a moment ago and that is the way it is illustrated?

A. That is right.

Q. So to that extent, in order to make the drawing 21, you had to [433] violate the construction shown in N-2 right on the very face of the drawing, didn't you?

A. It would appear that way.

Q. So that your testimony that 21 is an accurate illustration of the Italian patent N-2 is entirely erroneous, isn't that so, to that extent?

A. To that extent, yes.

Q. As a matter of fact, Mr. Armstrong, this drawing, No. 21, is completely deceptive as far as the illustration of the structure shown in the Italian patent N-2 is concerned, to that extent, isn't it?

A. To that extent. It reads on the specifications, though.

Q. I am talking about the drawing, what is shown in the drawing, and it was necessary in order to get the passageway that you were referring to,

(Testimony of John E. Armstrong.)

to bring up the water to the first outlet, that you had to reconstruct the pump and make a structure not shown in N-2 in order to accomplish it, isn't that the fact?

A. As I mentioned, that drawing may appear to be in error. It is not necessarily because of the fact that this line that he has drawn through here to try and show that boss does not necessarily mark a means of division between this boss and this part.

Q. It actually shows a division in ordinary drafting parlance, doesn't it?

A. No, that is brought over and shown in a separate broken [434] section, to show that passage.

Q. Let us draw it, Mr. Armstrong. You have little b on the drawing I am making, which corresponds to the section b on N-2; that is correct, isn't it?

A. Yes.

Q. And this line which I am marking B-1 is the bottom of the boss, isn't that correct?

A. Yes.

Q. You see the bottom of the boss in here, don't you?

A. It shows round at that point.

Q. And you said they contacted?

A. They should either be contacted or in one piece.

Q. It is shown as a contact.

A. I do not believe it is intended to show contact.

Q. But it does.

A. It is not necessarily interpreted that way.

Q. In A you have a separate section, which I am

(Testimony of John E. Armstrong.)

marking C, which corresponds to the section a in 21, isn't that so?

A. That is your interpretation of the drawing 21.

Q. Doesn't 21 clearly show it, Mr. Armstrong?

A. No, sir. Do you want me to draw it for you, how it could show it?

Q. How it could show it. I would like you to demonstrate on 21, too.

A. This is what that drawing is intended to convey. Now, the [435] section is broken through here, and then runs over to here to show a portion of this passageway which comes from the annular chamber back to the discharge.

Q. You actually show a line at the bottom of that boss which you said they contact?

A. Well, it would show a line.

Q. So you would have to add not only the ordinary thickness of half the boss, but you have to then add another wall, don't you?

A. No, I didn't add any other wall. I am telling you that is a shade line to show you that is round and also to show this passage which comes from the annular end.

Q. You heard Dr. Folsom's explanation of what he said the drawing N-2 illustrated to him?

A. Yes.

Q. And you have in mind how Dr. Folsom said the centrifugal pump N-2 operated. You recall that?

A. I don't recall his exact testimony. I know the general gist of it.

(Testimony of John E. Armstrong.)

Q. In other words, he testified, as I understood it, this drawing indicated to him there was a discharge from the first stage out through the line; do you recall that? A. Yes.

Q. And there was a discharge of the last stage out through 5. A. Yes. [436]

Q. And you agree with the latter part of it, that there is a discharge from the last stage out through 5? A. Yes.

Q. Just taking the centrifugal pump by itself, leaving all its installation off, that is a normal, old-fashioned two discharge pump, such as Mr. Granberg testified yesterday was at least 15 or 20 years old, to his knowledge?

A. Yes, Mr. Granberg also testified that they make pumps which discharge at the same pressure with more than one discharge.

Q. Yes, I understand that. And the pump he testified was a one-stage pump and this is not.

A. There are multiple stage pumps with more than one discharge.

Q. Assuming the doctor's statement was correct, just for an assumption, then the centrifugal pump shown by the Italian patent N-2 was a normal conventional, old-fashioned multi-stage pump with selective discharge?

A. May I have that question?

(Question read.)

Mr. Gray: Just a moment, if the Court please.

(Testimony of John E. Armstrong.)

I think the question is confusing. Assuming the doctor's statement is correct. Which statement? We have discussed several statements.

Mr. Mellin: The doctor's explanation of the operation [437] of the centrifugal pump, itself.

Mr. Gray: The entire operation?

Mr. Mellin: Of the centrifugal pump, yes, the entire operation.

The Witness: I forget what the question was.

Mr. Mellin: I will reframe the question.

Mr. Gray: If the Court please, I think we should interpose this objection——

The Court: Counsel is going to reframe the question.

Mr. Gray: I think he should ask the witness rather than ask the witness to remember what the doctor said.

Q. (By Mr. Mellin): Assuming, Mr. Armstrong, that the centrifugal pump shown in N-2 has the discharge 9 which discharges solely from the first stage—you understand that—from the last stage through discharge 5, then it would correspond with the conventional multi-stage pump with a low-pressure and a high-pressure discharge?

A. Yes, if you assume that and neglect the injector.

Q. That is correct, neglect the injector, just the pump; and you agree with Mr. Granberg that pumps of that type are extremely old? A. Yes.

Q. Then assuming that the pump in N-2 is the

(Testimony of John E. Armstrong.)

conventional two-discharge pump with a low-pressure discharge from the first stage and a high-pressure discharge from the last stage, would [438] there be any difference in the pumping system shown in N-2 than shown in Exhibit 5 representing the Berkeley pump system? A. Yes.

Mr. Bruce: Just a moment.

Mr. Gray: It is a hypothetical question. Is Exhibit 5 a complete system? Let us look at it.

Mr. Mellin: As I recall it. I heard the testimony four times with respect to it. I should know it by now.

Mr. Gray: I think you should show the witness the exhibit. We have 50 or 60 exhibits here.

The Witness: This is it, here. May I have the question?

(Question read.)

A. Yes. N-2 is not a complete pump system, for one thing.

Q. (By Mr. Mellin): In other words, I will have to eliminate the tank and the valve connection and the low-pressure discharge in Exhibit 5. Let us take just the centrifugal pump in both instances and just the jet connected together. They would be the same, wouldn't they?

A. You mean assuming that that does discharge from the first——

Q. That is correct, yes, with that assumption.

A. Yes, they would be the same, except, of

(Testimony of John E. Armstrong.)

course, one probably is presumed to be a three-stage pump, and this is shown as a two-stage pump.

Q. That would not make any difference in the mode of operation, however, would it? [439]

A. No.

Q. Does it make any difference that the Italian patent N-2 shows the pump horizontally disposed, rather than vertically disposed in the mode of operation? A. No.

Mr. Mellin: That is all. May I offer the sketch made by the witness and counsel as next in order?

Mr. Gray: If you do that, Counsel, would you designate that exhibit that you made?

Mr. Mellin: I will withdraw the offer, your Honor.

Mr. Gray: It is very confusing to put it in that way.

Mr. Mellin: I will withdraw the offer. I am not proud of my artistic efforts.

Mr. Gray: Your Honor, may we have a five-minute recess at this time?

The Court: Very well.

(Recess.) [440]

Mr. Mellin: If Your Honor please, may I ask the witness one more question? I overlooked something.

Q. I refer to plaintiff's Exhibit 19, which is the Carpenter patent on a high-low pressure pumping system, and I ask you if you understand the operation of the system shown in that exhibit.

(Testimony of John E. Armstrong.)

A. Yes.

Q. Now, as a matter of fact, that pumping system is for deep wells? A. Yes.

Q. And as a matter of fact, that system shows a low pressure discharge of high volume for irrigation, doesn't it? A. Yes.

Q. And it shows a high pressure takeoff to a pressure tank for household use?

A. Yes, sir.

Q. And it shows also the last centrifugal stage, if you wish to call it that, going directly to the tank, isn't that correct? A. That's correct.

Q. So that there you have in one system a low pressure high volume pumping for irrigation, and a low volume high pressure system for a tank, all in one system?

A. Yes, but it is not automatic, because there is a check valve in there.

Q. Yes.

Mr. Mellin: That is all. [441]

Redirect Examination

By Mr. Bruce:

Q. And that Carpenter patent also does not relate to an injector type system?

A. That's correct.

Q. It is a turbine type, isn't it? A. Yes.

Q. And in the use of an injector type system, many different problems—you are concerned with very different problems in your systems?

(Testimony of John E. Armstrong.)

A. Yes.

Q. Now, you made a sketch here and I am going to ask that that be——

Mr. Bruce: We will introduce the sketch you made in evidence as our exhibit next in number.

The Witness: Better show which is mine and which is his.

Mr. Bruce: Well, we will designate the sketch—let's designate the sketch which Mr. Mellin made as Figure 1, and the sketch which you made, with the two lines here, as Figure 2; embracing the two figures.

(Whereupon Figure 2 on diagram referred to above was received in evidence and marked Plaintiff's Exhibit No. 23.)

Q. (By Mr. Bruce): Now, Mr. Armstrong, assuming that the Veronesi pump is illustrated in Exhibit J and operates according to the defendant's interpretation, as defendant contends, does it embody all the features you have testified to as being new [442] and unique? A. No.

Q. In your systems? A. No.

Mr. Bruce: That is all.

Mr. Mellin: No further questions, Your Honor.

The Court: Mr. Armstrong, I suppose that the manufacturers of pumps in the United States have been, just as those engaged in the manufacture of other mechanical equipment, steadily attempting to improve the means of pumping water for household and irrigation purposes from wells?

(Testimony of John E. Armstrong.)

A. That's right.

Q. After all, you have all been engaged in that work for a number of years—that is, all who are engaged in the manufacture of pumps and pressure pumping systems.

A. Yes, sir.

Q. Now, as to the pump, the latest development that you have which you refer to in your catalogues which you consider to be a considerable improvement over present methods—do you?

A. That's correct.

Q. —and from time to time you still endeavor to find various mechanical means of improving the means of pumping so as to make pumps more serviceable for both household and irrigation purposes?

A. That's correct. [443]

Q. Now, these pumps that are illustrated in the drawings commencing with No. 5, or the exhibits commencing with No. 5 that you prepared with respect to defendant's pumps, they are not pumps that are used for deep installations, are they?

A. Well, defendant's pumps, from what I know of their catalogue, they recommend standard pumps down to around 120 or 150 feet. We offer a comparable line to 120 to 150 feet, and then we go up and go deeper and make a more complete line, possibly, than they do. But I don't know whether I am answering the question. But this pump and our pump are competitive pumps. Is that what you meant?

Q. That is what I am trying to find out in a way, yes.

A. Yes.

(Testimony of John E. Armstrong.)

Q. Except that I understood from something you said or some other witness said that these particular pumps were more of a shallow well type pump, leaving out the form in which they were described in these exhibits?

A. Well, no, Your Honor; a shallow well pump, as we understand it in the industry, is restricted to a depth of approximately 20 to 25 feet. These pumps are sold as shallow well pumps, and then later converted to deep well pumps or converted in the dealer's stock or at the factory by the addition of the injector for greater pumping depth down to 120 or 150 feet. Or in our case, even deeper.

Q. Now, you say that a device that may be constructed according [444] to the teaching of Exhibits 3 and 4, the two patents in suit, is an improvement in certain respects over the pumping pressure systems, pressure pumping systems that have previously been in use? A. Yes.

Q. According to the way you had theretofore made pumps? A. Yes.

Q. Now, how extensive is that improvement? What does it mean, what does the improvement mean in so far as it benefits the farmer?

A. It means more water for less money.

Q. And why is it more water for less money?

A. Because the pump is more efficient than anything heretofore existing, particularly with reference to the low pressure discharge that is taken for irrigation, where the volume of water that is

(Testimony of John E. Armstrong.)

pumped in relation to the power bill is an important consideration.

Q. Well, now, let's suppose that I have a farm of moderate size and I ask you to install one of your pumps, constructed according to the teaching of these patents. I have heretofore had the latest type of pump up to that time, and let's say I have a hundred acre farm and I have a reasonable amount of it in acreage that needs irrigation. Now, what would be the practical benefit to me in dollars and cents? I am not asking you to estimate it with any great precision, but how substantial would that be to me as a farmer to have that?

A. Well, that would result in possibly a reduction in a power bill of from 30 to 50 per cent over the existing type of pumps.

Q. What other benefit would he get from it?

A. He would get a saving on maintenance and adjustments. The control valve is quite an important item. There has been a lot of work done on them. We use a fixed control valve, others use what they call an automatic control valve. But they all go out of adjustment, either due to change in water level in our case primarily, or mechanical failure of moving parts, diaphragms and springs in the case of the automatic control valve. That means that when you get ready to water the chickens or the livestock, you open the faucet and no water comes out. Then it is a question of trying to phone the pump dealer and getting him to send out a man,

(Testimony of John E. Armstrong.)

and/or getting in the pickup and loading up a bunch of milk cans and going over to your neighbor's to get some water.

Q. Well, now, you say in the catalogue that you have put out—I noticed in looking at it the other day that it says that this is a revolutionary procedure, is being so designated in your catalogue. Now, before I ask you that, did I understand you to say that you are a mechanical engineer?

A. Yes, I am a professional mechanical engineer for the State of California.

Q. Why could not this be designated as an improvement in some [446] means of pumping rather than a revolutionary device? I don't want to embarrass you too much by asking that question, but is that intended to be an engineer's statement or a salesman's statement in the catalogue?

A. Well, we felt that it was quite an extensive improvement, and it may be a little bit optimistic and on the salesmanship side. In other words, they are still jet pumps.

The Court: That is all I had. If my questions prompt any questions on the part of counsel, don't hesitate to ask the witness.

Mr. Bruce: I don't believe they call for any further questions so far as I am concerned.

The Court: Well, are you through with the witness?

Mr. Mellin: No further questions.

The Court: All right.

Mr. Bruce: Now, Your Honor, before we rest we want to introduce into evidence plaintiff's interrogatories and defendant's answers thereto.

The Court: Very well.

Mr. Bruce: We will reopen the case for that purpose.

Now, if Your Honor please, as you can see in connection with the Varonesi patent, there are a number of—the Varonesi patent disclosures raise some problems. We think that the Veronesi disclosure is, even if it were accepted in full—it [447] needs no interpretation. It still doesn't dispose of the two inventive features.

Mr. Mellin: Are we arguing the case?

Mr. Bruce: To that matter. And I would suggest that we have the matter submitted on briefs, because it becomes very involved.

The Court: Well, is the evidence all finished now on both sides?

Mr. Mellin: Yes.

Mr. Bruce: Yes, Your Honor.

The Court: All right.

(Whereupon, following discussion among Court and counsel, the matter was submitted upon the filing of briefs, 45, 45 and 15.)

[Endorsed]: Filed September 7, 1949. [448]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and Exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint.

Answer to Complaint and Counterclaim for Declaratory Relief and Injunction.

Motion and Notice of Motion for Order to Answer Cross-Complaint and for Reasonable Attorneys' Fees.

Answer to Counterclaim.

Defendants' Answer to Plaintiff's Oral Interrogatory.

Plaintiff's Interrogatories and Answers to Plaintiff's Interrogatories.

Stipulation Re Defendants' Pumps and Pump Systems.

Memorandum Decision.

Defendants' and Counterclaimant's Proposed

Findings of Fact and Conclusions of Law.

Judgment.

Motion and Notice of Motion to Amend Findings.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order Amending Findings of Fact and Conclusions of Law.

Reporter's Transcripts—Vol. 1 for May 11, 1949; Vol. 2 for May 12, 1949; Vol. 3 for May 13, 1949; Vol. 4 for May 16, 1949; Vol. 5 for May 17, 1949.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 7-a, 8, 8-a, 9, 9-a, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23.

Defendants' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, M-1, M-2, N, N-1, N-2, O, P, Q, R, S, T, U, U-1, U-2, V, V-1, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ-1, AJ-2, AJ-3, AJ-4, AJ-5 and AJ-6.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 6th day of May, A.D. 1950.

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12540. United States Court of Appeals for the Ninth Circuit. Jacuzzi Bros., Incorporated, a Corporation, Appellant vs. Berkeley Pump Company, a Corporation, Berkeley Pump Company, a Partnership, and Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnie T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, Partners Associated in Business Under the Fictitious Name and Style of Berkeley Pump Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 8, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,540

JACUZZI BROS., INCORPORATED, a
Corporation,

Appellant,

vs.

BERKELEY PUMP COMPANY, a Corporation,
BERKELEY PUMP COMPANY, a Partner-
ship, and FRED A. CARPENTER, LANA L.
CARPENTER, F. F. STADELHOFFER,
ESTELLE E. STADELHOFFER, JACK L.
CHAMBERS, WYNNIE T. CHAMBERS,
CLEMENS W. LAUFENBERG and MARIE
C. LAUFENBERG, Partners Associated in
Business Under the Fictitious Name and Style
of Berkeley Pump Company,

Appellees.

APPELLANT'S STATEMENT
OF POINTS ON APPEAL

The above-named appellant, pursuant to Rule 19, Paragraph 6, of the Rules of this Court, hereby makes the following statement of points asserted as errors and on which it intends to rely in the prosecution of its appeal herein, and asserts that the trial Court erred in each of the following respects:

1. In finding and concluding that United States Letters Patent No. 2,344,958 and each of the claims thereof are invalid and void in law;

2. In finding that said Letters Patent No. 2,344,958 fails to disclose and claim an invention patentable over the prior art and is invalid for want of invention;

3. In finding that Claims Nos. 1, 2 and 4 through 9 of said patent No. 2,344,958 are so broad that they define no invention and are invalid;

4. In finding that the system disclosed in Claims Nos. 1, 2 and 4 through 9 of said patent No. 2,344,958 is the precise system disclosed in the Veronesi Italian Patent No. 260,417;

5. In finding that said patent No. 2,344,958 and any or all of the claims thereof are anticipated by any other prior art patents, use or publication;

6. In finding and concluding that United States Letters Patent No. 2,424,285 and each of the claims thereof are invalid and void in law;

7. In finding that said Letters Patent No. 2,424,285 fails to disclose and claim an invention patentable over the prior art and is invalid for want of invention;

8. In finding that Claims Nos. 3, 9 to 14, 17 and 18 of said patent No. 2,424,285 are so broad that they define no invention and are invalid;

9. In finding that Claim No. 11 of said patent No. 2,424,285 is fully anticipated by the Schmid British Patent No. 382,592;

10. In finding that said patent No. 2,424,285 and any or all of the claims thereof are anticipated by any other prior art patents, use, or publication;

11. In finding that Claim No. 11 of said patent No. 2,424,285 has not been infringed by defendants;

12. In finding that Claim No. 13 of said patent No. 2,424,285 in substance is identical with those claims in said patent No. 2,344,958 which do not specify that the discharge opening is valve free;

13. In not finding and concluding that said patents Nos. 2,424,285 and 2,344,958, and each of them, and each and all of the claims of each of said patents, are valid;

14. In admitting in evidence Italian Patent No. 139,161, defendants' Exhibit M, and all testimony and evidence relating thereto;

15. In admitting in evidence testimony and other evidence relating to prior foreign manufacture, use, sale and publication of the structure or system purportedly disclosed in Italian Patent No. 260,417, defendants' Exhibit N;

16. In dismissing plaintiff's complaint;

17. In rendering judgment for defendants and defendant counterclaimant and awarding them their costs of suit.

Dated: May 11, 1950.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 12, 1950.

[Title of District Court and Cause.]

DESIGNATION OF ALL OF THE RECORD
MATERIAL TO THE CONSIDERATION
OF THE APPEAL HEREIN

Notice Is Hereby Given that the plaintiff and appellant, Jacuzzi Bros., Incorporated, a corporation, does hereby designate all of the record which is material to the consideration of the appeal herein as follows:

1. Complaint.
2. Answer to Complaint and Counterclaim for Declaratory Relief and Injunction.
3. Answer to Counterclaim.
4. All interrogatories and answers thereto.
5. Stipulation as to use of printed copies of patents.
6. Stipulation admitting manufacture and sale by defendant of alleged infringing devices.
7. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions, applications and objections to the introduction of evidence made during the trial and the rulings thereon.
8. Memorandum Decision filed in the District Court on February 23, 1950.

9. Findings of Fact and Conclusions of Law.
10. Order Amending Findings of Fact and Conclusions of Law.
11. Judgment.
12. Notice of Appeal.
13. Supersedeas and Costs Bond.
14. Designation of Contents of Record on Appeal filed in the District Court.
15. This Designation of all of the Record Material to the Consideration of the Appeal Herein.
16. Appellant's Statement of Points on Appeal.
17. All other records referred to or required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

Dated: May 11, 1950.

/s/ CHAS. O. BRUCE,

/s/ NATHAN G. GRAY,

Attorneys for Plaintiff and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 12, 1950.





